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No.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1995

JOHN DIBIASE

Petitioner,

against

SMITHKLINE BEECHAM
CORPORATION

Respondent.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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Questions Presented For Review

1. Does a company policy violate the Age Discrimination in Employment Act (ADEA) if it requires terminated workers forty years of age or older ("older workers") to release all claims, including those under ADEA, as a condition of receiving the same enhancement in separation benefits that comparably situated workers under age forty receive without releasing ADEA claims?

2. Is a company policy facially discriminatory against older workers where the policy requires that terminated employees sign a release of all claims in order to qualify for enhanced separation benefits, and the required release form states that the employee is releasing "all claims under the Age Discrimination in Employment Act" -- claims that can only be brought by older workers?

3. Assuming a non-facially discriminatory policy, if the company is put on notice of the policy's disparate treatment of older workers, and after notice carries out the policy, is it necessary to prove intent to discriminate in order to prevail in an age discrimination case?

4. Is proof of unlawful intent to discriminate necessary to prevail in a non-facially age discriminatory practice case?

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PLAINTIFF, JOHN DIBIASE'S, PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, John DiBiase, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Third Circuit, rendered in these proceedings on February 16, 1995

Reports of Opinions Delivered in the Courts Below

The United States District Court for the Eastern District of Pennsylvania issued an order on May 2, 1994 (filed May 3), granting summary judgment to Mr. DiBiase on his claim that the separation plan of respondent, SmithKline Beecham ("SmithKline"), violated the Age Discrimination in Employment Act, 29 U.S. C. Section 626 (c) (ADEA). The order relied on the reasons set forth in the court's March 15, 1994 opinion denying SmithKline's motion for summary judgment on this claim. DiBiase v. SmithKline Beecham Corp., 847 F.Supp. 341 (E.D. Pa. 1994)(51a).

The United States Court of Appeals for the Third Circuit reversed the district court and directed judgment for SmithKline, in an opinion issued February 16, 1995. DiBiase v. SmithKline Beecham Corp., 48 F.3d 719 (3d Cir. 1995) (3a).

Statement of Jurisdiction

The Court of Appeals filed its opinion and entered judgment on February 16, 1995 (3a, 48a). The Court of Appeals entered an order denying Mr. DiBiase's timely request for rehearing on March 21, 1995 (1a). On June 12, 1995, Justice Souter granted DiBiase's request for an extension of time to petition for certiorari and extended the time to August 18, 1995. This Court has jurisdiction to review the judgment of the Court of Appeals under Title 28 U.S.C. Section 1254 (1) granting jurisdiction to this Court to review by writ of certiorari cases in the Courts of Appeals, upon petition of any party.

Statute Involved

This case involves the scope of liability under the ADEA, a federal anti-discrimination statute that renders it unlawful for an employer (29 U.S.C. Sec. 623 (a)):

> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely

affect his status as an employee, because of such individual's age.

Statement of the Case

1. Nature and History of the Case

This case, filed June 14, 1993 is brought under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. Section 626(c). Plaintiff, John DiBiase's, amended complaint states two counts of age discrimination. In Count I DiBiase claims that his former employer, defendant SmithKline Beecham ("SmithKline or the "Company"), a major pharmaceutical company, discriminated against him because of his age (51), by terminating his employment as a computer shift supervisor as part of a reduction in force, after 27 years of employment with the Company and its predecessors. In Count II DiBiase claims that SmithKline's separation policy, which provides a higher lump sum separation payment and greater health benefits to all terminated employees that sign a general release of all claims against the company, violates ADEA because persons forty years of age or older are being forced to relinquish claims of age discrimination under ADEA and the Pennsylvania Human Relations Act, 43 P.S. Section 954, et seq. (PHRA), which can not be brought by terminated employees under forty.

On December 16, 1993, DiBiase filed a second action which was consolidated for trial with his first action. In his second action DiBiase claims retaliation

by SmithKline in its denial of a third-shift computer supervisor position which became available after his termination, because he had charges of discrimination pending against SmithKline.

On December 20, 1993, SmithKline moved for summary judgment on both counts of DiBiase's amended complaint in his first action. On March 15, 1994, the district court issued an opinion and order granting SmithKline's motion for summary judgment on Count I of the first action, the claim that SmithKline violated ADEA in selecting DiBiase for termination in connection with the reduction in force and denying the Company's motion for summary judgment on Count II, the claim that the separation benefit policy violated ADEA. On April 26, 1994, DiBiase moved for summary judgment on his claim that the separation policy violated ADEA. On April 29, 1994, pursuant to a settlement agreement, the parties stipulated to the dismissal of the second action. On May 3, 1994, in accordance with its March 15, 1974 opinion, the district court granted Mr. DiBiase's motion for summary judgment on his claim that the separation plan violated ADEA. Without conceding liability, SmithKline agreed to entry of Judgment in the amount of $14,203.13, the quantum of damages agreed to by the parties if SmithKline was ultimately found liable on this claim after it exhausted its appeals (49a-50a).

SmithKline filed notice of appeal to the Third Circuit Court of Appeals on May

3, 1994. On February 16, 1995 a panel of that court (C.JJ. Becker, Greenberg, and McKee) issued an opinion reversing the district judge and directing judgment for SmithKline. The panel decision held that the separation plan did not violate ADEA.

2. Facts

SmithKline is a Philadelphia based pharmaceutical company that, among other things, manufactures and markets prescription and over-the-counter pharmaceutical and consumer products.

DiBiase's employment with SmithKline or its predecessors began about 1964. His employment continued until February 2, 1992, when he was laid off as part of a reduction in force. At the time of his layoff, Mr. DiBiase was a first-shift computer shift supervisor in the corporate data center at King of Prussia, Pennsylvania. In this employment he was a supervisor of the computer operators working in the Data Center. On February 2, 1992, Mr. DiBiase's manager told him his position was being eliminated as part of a reduction in force. When he was laid off DiBiase was 51 years old and had the most company service of the five computer shift supervisors who were then employed at the data center. SmithKline retained three shift supervisors with less company service.

DiBiase was entitled to separation benefits under a SmithKline separation benefit plan (Plan), including a lump sum separation payment and extended health

and dental coverage. The Plan provided a lump sum separation payment based upon length of service. The Plan further provided that persons who signed a release of claims against SmithKline (Release) received a greater separation payment than similarly situated persons with the same length of service who refused to sign the release. The Plan also provided for continuation of health and dental coverage provided to SmithKline employees. Persons who signed the Release received six months continuation, and persons who declined to sign, received three months continuation of health and dental coverage. Under the Plan DiBiase was entitled to a separation benefit of fifteen months pay ($65,616) if he signed the release and a separation benefit of twelve months pay ($52,493) if he declined to sign the release. The release said in pertinent part:

> In consideration of the monies and other consideration to be received by me under the SmithKline Beecham Separation Program, I hereby irrevocably and unconditionally release, waive and forever discharge SmithKline Beecham Corporation, its affiliates, parents, successors, predecessors, subsidiaries, assigns, directors, officers, employees, representatives, agents, and attorneys . . . from any and all claims, agreements, causes of action, demands, or liabilities of any nature whatsoever . . . arising, occurring or existing at any time prior to the signing of this General

Release, whether known or unknown.

* * *

The release further provided that employees who signed it waived:

> any and all claims arising under federal, state, or local constitutions, laws, rules or regulations or common law prohibiting employment discrimination based upon age, race, color, sex, religion, handicap or disability, national origin or any other protected category or characteristic, including but not limited to any and all claims arising under the Age Discrimination in Employment Act of 1967, as amended, the Civil Rights Act of 1964, the Civil Rights Acts of 1866 or 1871, the National Labor Relations Act and/or under any other federal, state or local human rights, civil rights, or employment discrimination statute, rule or regulation.

DiBiase declined to sign the Release because he did not wish to relinquish rights under federal and state age discrimination laws. On April 29, 1992, in connection with his lay-off, Mr. DiBiase wrote William Mossett, the SmithKline personnel director, saying that he believed the Company's policy requiring persons forty and older to release age discrimination claims against the Company in order to secure enhanced separation benefits violates age discrimination laws since persons under

forty may elect to receive enhanced separation benefits determined by the same formula that applies to persons over forty without releasing potential age discrimination claims. His letter said in pertinent part:

> "Dear Mr. Mossett:
> So there can be no possible misunderstanding I am stating my position as follows.
>
> * * *
>
> (5). As stated in my grievance I have reason to believe that the company violated federal and state age discrimination laws in terminating me. I am declining the enhanced separation benefit package because I do not wish to give up my rights under these discrimination laws. I believe that the company's policy of requiring persons over forty to release age discrimination claims against the company in order to secure enhanced separation benefits violates these age discrimination laws since persons under forty may elect to receive enhanced separation benefits determined by the same formula that applies to persons over forty without releasing potential age discrimination claims.
>
> * * *
>
> Sincerely,
> /S/
> John DiBiase"

SmithKline denied DiBiase the enhanced separation package because he declined to sign the required release. In his amended complaint DiBiase offered to release all claims against SmithKline except age discrimination claims under ADEA or the Pennsylvania Human Relations Act (PHRA), claims that could only be brought by persons age forty or older, in exchange for the additional monetary and medical separation benefits. DiBiase alleged that the release he was offering was the same as the release that employees under forty sign as a condition of receiving enhanced benefits.

3. Opinions Below

a. Decision of The District Court

In its March 15, 1994 opinion the district court found that SmithKline's separation benefit plan violated ADEA because:

(1) The plan is facially discriminatory since by its express terms it conditions enhanced benefits on the waiver of all claims under ADEA and thus explicitly treats persons forty or over who can have potential age discrimination claims under ADEA differently from those under forty who can have no such claims. 847 F. Supp. 347-348 (66a).

(2) The plan discriminates against individual older employees with respect to compensation, terms, conditions or privileges of employment, since "the plan targets the right to make claims, and

explicitly discriminates because older workers only receive the benefit enhancement if they waive potential claims that younger workers simply cannot have". 847 F.Supp 347-348 (67a-70a).

(3) The discrimination in the plan does not fall within the limited category of discriminatory practices permitted under ADEA to observe the terms of a bonifide employee benefit plan. 29 U.S.C. Section 623 (f)(2)(B)(i).[1] This follows since the plan benefits are distributed in a lump sum severance payment involving no age related costs. Although an employer may extend unequal age related benefits that have equal costs (e.g. life insurance), it may not require unequal consideration of older workers (e.g.

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[1] 29 U.S.C. Sec. 623(f)(2)(B)(i):

it shall not be unlawful for an employer, employment agency, or labor organization

* * *

(2) to take an action otherwise prohibited under subsection (a), (b), (c), or (e) of this section-

* * *

B) to observe the terms of a bona fide employee benefit plan-

(i) where, for each benefit or benefit package, the actual amount of payment made or cost incurred on behalf of older workers is no less than that made or incurred on behalf of younger workers as permissible under section 1625.10, Title 29, Code of Federal Regulations (as in effect on June 22, 1989);

waiving ADEA claims) in exchange for equal lump sum severance benefits. 847 F.Supp. 348-349 (71a-73a).

(4) The provision in the Older Workers Benefit Protection Act which amended ADEA to permit voluntary waivers of age discrimination claims (29 U.S.C. Section 626(f)(1)), was concerned with protecting older workers from being bullied or coerced into releasing claims and did not permit the employer to discriminate against older workers in securing release of such claims. 847 F.Supp. 349-350 (74a-75a).

(5) Public policy considerations do not compel a different result in view of ADEA's clear congressional intent that distinctions based on age in the terms, conditions and privileges of employment are impermissible. Requiring the employer to offer additional consideration to older workers for release of ADEA claims would not involve any onerous administrative burden. 847 F.Supp. 350-351 (77a-79a).

b. Decision of Court of Appeals

In reversing the district judge the panel held the Plan does not involve disparate treatment of older workers that violates ADEA, because:[2]

---

[2] The Opinion also discussed whether a disparate impact analysis was applicable to the Plan. 48 F.3d 730-735. Judge Becker did not join in this

(1) The district judge erred in holding the Plan facially discriminatory because his conclusion: "required referencing a fact outside the policy-namely the ADEA." The Plan is not facially discriminatory against older workers, because: "it is impossible to examine SmithKline's policy and conclude that on its face it treats older workers disparately .... the policy does not classify persons on the basis of age. On the contrary, the plan offering is an archetypical example of a facially non-discriminatory policy. SmithKline made the expanded package available to all persons willing to sign the release regardless of age. SmithKline did not require employees to waive only ADEA claims but all claims." 48 F.3d 727 (22a-23a).

(2) Because the Plan is not facially discriminatory, DiBiase had to prove that the SmithKline Plan had a "discriminatory motive" against older workers and "the record does not contain even the slightest evidence of

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discussion since he found that DiBiase did not raise a disparate impact claim and the issue was not before the court. 48 F.3d 731,n.16. Judges Greenberg & McKee found that disparate impact was not applicable to this case. 48 F.3d 731-732. Judge Greenberg, writing alone, then expressed doubts whether disparate impact analysis could ever be used under ADEA. 48 F.3d 732-735. Mr. DiBiase did not claim disparate impact applicability.

discriminatory motive". 48 F.3rd 728, (25a-26a).

(3) The fact that DiBiase put SmithKline on notice by his letter of the different treatment accorded older workers under the Plan in having to waive ADEA claims, did not eliminate the requirement that DiBiase prove "illicit intent" to discriminate by SmithKline. 48 F.3d 728,n10, (25a-26a,n10).

(4) There is no unequal treatment of older workers under the Plan since all employees are required to relinquish all potential claims to qualify for the extra benefits and the value of the mixture of claims the younger worker gives up may exceed the value of the mixture of claims the older worker gives up, even though the older worker is forced to relinquish age discrimination claims not available to employees under age forty. 48 F.3d 728-729 (26a-30a).

REASONS WHY THE WRIT SHOULD BE GRANTED

1. The Court of Appeals decided important federal questions in conflict with applicable decisions of this Court

(a) The appellate decision is contrary to a decision of this Court in its holding that it is necessary to prove illegal intent to discriminate in a non-facial disparate treatment case.

The Third Circuit opinion holds that proof of illegal motive to discriminate is necessary in a non-facial disparate treatment case. This follows from the language in the opinion that DiBiase must prove "intent to discriminate" and that "the record does not contain even the slightest evidence of discriminatory motive" 48 F.2d 728, and the language of footnote 10: "Dibiase also contends that the intent to discriminate can be inferred based on his letter to SmithKline... We disagree. The logical consequence of that argument is that an employee can manufacture an illicit intent on the part of the employer..." (emphasis added).

This holding of the requirement of proving unlawful motive or intent to discriminate is contrary to International Union UAW v. Johnson Controls, 111 S.Ct. 1196 (1991), which held that an unlawful motive was not necessary in a disparate treatment case (1204):

> "Moreover, the absence of a malevolent motive does not convert a

> facially discriminatory policy into a neutral policy with a discriminatory effect. Whether an employment practice involves disparate treatment through explicit facial discrimination does not depend on why the employer discriminates but rather on the explicit terms of the discrimination."

It is clear from the above language that Johnson Controls holds that proof of illegal motive is not required in a disparate treatment case, but only proof of intent to achieve the different treatment of the protected class. This intent is established without further proof when the policy is facially discriminatory, because the difference in treatment is apparent from the explicit terms of the policy. This Court's holding that unlawful intent is not required in a disparate treatment case clearly applies equally to non-facial disparate treatment. It is a well-established principle that violation of a statute requiring intent does not require proof of illegal intent. For example intent to deceive, manipulate or defraud is required to establish liability under rule 10b-5 promulgated under the Securities Exchange Act, 15 U.S.C.A. Section 78j(b). Ernst & Ernst v. Hochfelder, 96 S.Ct. 1375, 1381 (1976). In accord with this principle, intent only requires knowledge of what one is doing and the consequences of the acts. S.E.C. v. Falstaff Brewing Corp., 629 F.2d 77 (D.C. Cir. 1980):

"Kalmanovitz contends that scienter requires an inquiry into defendants state of mind-his subjective belief as to the legality of his action. We strongly disagree. Knowledge means awareness of the underlying facts, not the labels the law places on those facts. Except in very rare instances, no area of the law -not even the criminal law - demands that a defendant have thought his actions were illegal. A knowledge of what one is doing and the consequences of those actions suffices."

A facially discriminatory policy is not per se illegal. For example, the employer might have a policy that employees under forty receive $10,000 in life insurance as a condition of employment while employees forty years or older receive only $5,000 life insurance. The policy is facially discriminatory against the older workers but it would be legal under ADEA under the equal cost exception, if the employer showed that the insurance carrier charged equal premiums for both the older and younger worker's insurance. 29 U.S.C.A. Section 623(f)(2)(B)(i). The employer is on notice of the different treatment accorded the older workers and the younger workers because the difference in treatment is apparent from reading the benefit policy. When the employer carries out the policy he knows about the difference in treatment and intends to achieve the result that older workers receive lower insurance coverage. This supplies the requisite intent to

discriminate and the employer takes the risk of whether the difference in treatment violates ADEA. If, in fact, the cost of the premium for the older worker's insurance is less than the premium for the younger worker's insurance than the employer violates ADEA, regardless of his good faith belief that his benefit practice was legal.

Thus, Johnson Controls only stands for the proposition that it is not necessary to prove intent to discriminate when an employer caries out a facially discriminatory policy because the policy directly shows its different treatment of the protected category of employee. The employer, on notice of the different treatment, intends to achieve the different result when he follows the policy. This establishes requisite intent and the employer takes the risk of whether the policy violates ADEA.

Assuming, as the panel opinion held, that the SmithKline Plan is facially non-discriminatory, the requisite intent is supplied by DiBiase putting SmithKline on notice of the different treatment inherent in its separation plan in his letter explaining that the SmithKline separation plan forced workers forty or older to release ADEA claims in exchange for the same enhancement of benefits that workers under forty received who did not release such claims. DiBiase's letter said:

> "I believe that the company's policy of requiring persons over forty to

> release age discrimination claims against the company in order to secure enhanced separation benefits violates these age discrimination laws since persons under forty may elect to receive enhanced separation benefits determined by the same formula that applies to persons over forty without releasing potential age discrimination claims."

DiBiase's letter put SmithKline on notice of the difference in treatment its Separation Plan accorded the ADEA protected workers from the younger workers, which was that the older workers had to give up their ADEA claims in order to receive the same enhancement in benefits the younger workers received without relinquishing ADEA claims.

SmithKline was then legally in the same position as if the policy stated the difference in treatment on its face. SmithKline knew the difference in treatment and when it chose to go ahead after notice, it assumed the risk of whether its conduct violated ADEA. DiBiase's letter eliminated any further need to show intent. The panel decision erred in misapprehending the meaning of Johnson Controls and the consequence of DiBiase's letter.

The court of appeals also erred in finding the Plan facially non-discriminatory. The district judge correctly ruled that the Plan facially discriminated against older workers (847 F. Supp 347):

> "By its express terms, SmithKline's Plan conditions enhanced benefits on the waiver of any and all claims arising under ADEA. Because ADEA provides a cause of action for age discrimination only to persons age forty and above, the Plan explicitly treats older employees differently than younger employees. An employment policy explicitly mandating different treatment of persons within the protected class facially discriminates."

The Plan release document shows that the district judge was correct in his conclusion that the Plan was facially discriminatory. That document requires as a condition of receiving enhanced benefits that the employee specifically waive:

> "Any and all claims arising under federal, state or Local constitutions, laws, rules or regulations or common law prohibiting employment discrimination based upon age, race, color, sex religion, handicap or disability, national origin or any other protected category or characteristic, including but not limited to any and all claims arising under the Age Discrimination in Employment Act of 1967, as amended, the Civil Rights Act of 1964, the Civil Rights Acts of 1866 or 1871, the National Labor Relations Act and/or under any other federal, state or local human

rights, civil rights, or employment discrimination statute, rule or regulation." (emphasis added).

The Policy is facially discriminatory because its release singles out the protected class of persons forty years or older and requires these persons to relinquish a class of claims unique to them in order to receive the same enhancement in benefits that persons under forty receive without releasing such claims. Put another way, persons under forty and those forty years or over are both required to generally release all claims against SmithKline. Thus both age groups are required to release the broad category of potential claims that can be brought by any individual regardless of age including claims for personal injury, breach of contract, and discrimination because of sex, national origin, religion or other personal characteristics that all persons possess. The Plan requires the older employee to release age discrimination claims in addition to releasing the broad category of potential claims common to all employees that are not age dependent.

b. The appellate decision is contrary to a decision of this court in its reasoning that the Plan was not age discriminatory

The appellate opinion held that the Plan did not discriminate against older workers since all employees are required to relinquish all potential claims to qualify for the extra benefits and the value of the mixture of claims a younger

worker gives up might exceed the value of the mixture of claims an older worker gives up, even though the older worker is forced to relinquish age discrimination claims not available to employees under age forty. 48 F.3d 728-729, -a-a.h.

This court rejected such reasoning in Los Angeles Department of Water & Power v. Manhart, 435 U.S. 702 (1978). In Manhart the defense to a complaint of sex discrimination in a policy charging female employees more than male employees for equal retirement benefits was that mortality tables showed that woman on average outlive men and the value of the average female employee's pension benefit was therefore greater than that of the average male employee. This Court held the water department policy unlawfully discriminated against females stating that "[e]ven a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply." Manhart, at 708. This Court concluded that (435 U.S. 711):

> An employment practice that requires 2,000 individuals to contribute more money into a fund than 10,000 other employees simply because each of them is a woman, rather than a man, is in direct conflict with both the language and the policy of [Title VII]. Such a practice does not pass the simple test of whether the evidence shows treatment of a

person in a manner which but for that person's sex would be different.

The district judge, relying on Manhart said (847 F.Supp 348):

> "Similarly, an employment practice that requires older individuals to release more rights than younger workers simply because each of them is at least age forty, rather than below age forty, is in direct conflict with both the language and the policy of ADEA. Such a practice does not pass the simple test of whether the evidence shows treatment of a person in a manner which but for that person's age would be different."

DiBiase's contention was that the Plan was discriminatory because it denied him and the other workers forty years or older the opportunity to secure the enhanced separation benefits on exactly the same terms that were offered the younger workers--by releasing all claims except claims that could only be brought by persons forty years or older. DiBiase told SmithKline he would sign the precise equivalent of the release the younger workers signed but he was denied the enhanced separation benefits given the younger workers. The difference in treatment is obvious. It has nothing to do with any evaluation of the worth of potential claims.

DiBiase argued that in order to

avoid violating ADEA, SmithKline would have to give him exactly the same choice the employee under forty was getting, namely the right to receive the enhanced separation benefits by signing the exact equivalent of the release the younger worker was required to sign -- a release of all claims against SmithKline except those that could only be brought by persons forty years or older.

To comply with ADEA, SmithKline would first have to offer the older workers the same enhancement in separation benefits the younger workers received, in exchange for signing a release limited to the same classes of claims the younger workers released. If SmithKline wanted to secure a release of the ADEA claims that only workers forty years or older could bring, it would then have to proceed with a second tier offer of an additional incentive to the older workers geared to induce most of them to voluntarily release their ADEA claims. Mr. DiBiase argued that no one could be forced to release any claims and that a release of claims must be voluntary.

2. The Court of Appeals decided an important issue of first impression in violation of the Congressional mandate

Congress passed the Older Workers Benefit Protection Act (OWBPA), among other things, to overrule the Supreme Court decision in Public Employees Retirement System of Ohio v. Betts, 109 S.Ct. 2854 (1989), a decision which insulated almost all employment

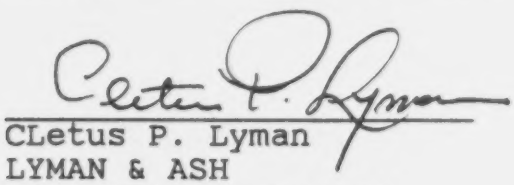
retirement plans from ADEA constraints. Congress reacted to the Betts decision by amending ADEA with the stated intent of overruling Betts and restoring the ADEA prohibition against "discrimination against older workers in all employee benefits except when aged-based reduction in employee benefits are justified by significant cost considerations [e.g., an insurance policy where the same payment for the policy secures a lower amount of insurance coverage for an older person]." 29 USCA Section 621 note. The "Older Workers Benefit Protection Act" (OWBPA), containing this amendment, was passed on October 16, 1990. The legislative history of OWBPA makes clear the congressional determination to prohibit discrimination against older workers in employee benefit plans. See Older Workers Benefit Protection Act, S. Rep. No. 263, 101st Cong., 2d Sess. 12 [hereinafter Senate Report], reprinted in 1990 U.S.C.C.A.N. 1509, et seq.

The panel decision is contrary to this congressional mandate in allowing employers to force older workers to relinquish ADEA claims if they wish to qualify for the same separation benefits younger workers receive without giving up ADEA claims.

Conclusion

WHEREFORE, the petition should be granted.

Respectfully submitted,



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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 94-1530

JOHN DIBIASE

Appellee

v.

SMITHKLINE BEECHAM CORPORATION

Appellant

On Appeal from the United States District Court for the Eastern District of Pennsylvania
(D.C. 93-cv-3171)

SUR PETITION FOR REHEARING

BEFORE: SLOVITER, Chief Judge, and BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, MCKEE, and SAROKIN, CIRCUIT JUDGES

The petition for rehearing filed by the appellee, John DiBiase, in the above captioned matter having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the court in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the

circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT:

/s/ Morton I. Greenberg
Circuit Judge

DATED: MAR 21 1995

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 94-1530

JOHN DIBIASE
Appellee

v.

SMITHKLINE BEECHAM CORPORATION
Appellant

On Appeal from the United States District Court for the Eastern District of Pennsylvania
(D.C. 93-cv-3171)

Argued December 15, 1994

BEFORE: BECKER, GREENBERG, and McKEE, Circuit Judges.

(Filed: February 16, 1995)

OPINION OF THE COURT

GREENBERG, Circuit Judge.

This is an appeal from a district court's judgment predicated on its opinion holding that an employer violates the Age Discrimination in Employment Act ("ADEA") by offering to all employees terminated as a result of a

reduction-in-force (RIF) enhanced severance benefits in return for a general release of all claims, including ADEA claims, against the employer. We conclude that such a practice does not violate the ADEA, and therefore we will reverse the judgment of the district court. Because there is no basis for further proceedings in this case, we will remand the matter to the district court with instructions to enter judgment for the defendant.

I. INTRODUCTION, FACTUAL BACKGROUND, AND PROCEDURAL HISTORY

The germane facts are not disputed.[1] In 1990, the employer, defendant SmithKline Beecham Corporation (SmithKline), a Philadelphia-based pharmaceutical company, consolidated four computer data centers it operated throughout Pennsylvania and in Tennessee into a single center at King of Prussia, Pennsylvania. Prior to the consolidation, SmithKline employed plaintiff John DiBiase as a first-shift supervisor of computer operators at its Philadelphia data center. With the consolidation, he moved to King of Prussia, where six supervisors remained employed, working two per shift, with each pair overseeing three to five computer operators. Between

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[1] Unless otherwise noted, we take the facts from the district court opinion. DiBiase v. SmithKline Beecham Corp., 847 F. Supp. 341 (E.D. Pa. 1994).

late 1991 and early 1992, SmithKline decided to reduce the staff of this division, and it assessed the concomitant consequences. Specifically, the data center's personnel manager "prepared an 'adverse impact analysis' examining the gender, race, and age of the shift supervisors to determine if any adverse impact would result from the planned reduction in staff." DiBiase, 847 F. Supp. 341, 343. On February 1, 1992, SmithKline decided to lay off DiBiase and one other shift supervisor and it informed DiBiase of this decision the next day. At that time, he was 51 years old.

SmithKline offered employees terminated in a RIF a separation benefit plan, which provided a lump sum payment based on the employee's length of service, as well as continued health and dental benefits. Specifically, the basic plan provided 12 months salary and three months continued benefits. Additionally, the plan offered enhanced benefits to employees willing to sign a general release of all claims against SmithKline. Terminated employees who signed the release were entitled to receive 15 months salary and six months continued health and dental coverage. The release is in large part the subject of this appeal, and it stated in pertinent part:

> In consideration of the monies and other consideration to be received by me under the SmithKline Beecham Separation Program, I hereby irrevocably and unconditionally

> release, waive and forever discharge SmithKline Beecham Corporation, its affiliates, parents, successors, predecessors, subsidiaries, assigns, directors, officers, employees, representatives, agents, and attorneys . . . from any and all claims, agreements, causes of action, demands, or liabilities of any nature whatsoever . . . arising, occurring or existing at any time prior to the signing of this General Release, whether known or unknown.

General Release Sec. 1 at app. 98. The release provided that employees who sign it waive

> any and all claims arising under federal, state, or local constitutions, laws, rules or regulations or common law prohibiting employment discrimination based upon age, race, color, sex, religion, handicap or disability, national origin or any other protected category or characteristic, including but not limited to any and all claims arising under the Age Discrimination in Employment Act of 1967, as amended, the Civil Rights Act of 1964, the Civil Rights Acts of 1866 or 1871, the National Labor Relations Act and/or under any other federal, state or local human rights, civil rights, or employment discrimination statute, rule or regulation.

Release Sec. 1 Para. 2 at app. 98. Prefatory language to the release cautioned employees that "YOU SHOULD THOROUGHLY REVIEW AND UNDERSTAND THE TERMS, CONDITIONS AND EFFECT OF THE SEPARATION PROGRAM AND OF THIS GENERAL RELEASE. THEREFORE, PLEASE CONSIDER IT FOR AT LEAST TWENTY-ONE (21) DAYS BEFORE SIGNING IT. YOU ARE ADVISED TO CONSULT WITH AN ATTORNEY BEFORE YOU SIGN THIS GENERAL RELEASE." Release at app. 98. Under the terms of the release, employees were given seven calendar days after signing to revoke their signature. Release at app. 99.

DiBiase declined to sign the release. Instead, on April 29, 1992, he wrote a letter to William Mossett, SmithKline's personnel director, contending that SmithKline's policy violated the ADEA. The letter reads in pertinent part:

> So there can be no possible misunderstanding I am stating my position as follows.
>
> * * *
>
> As stated in my grievance I have reason to believe that the company violated federal and state age discrimination laws in terminating me. I am declining the enhanced separation benefit package because I do not wish to give up my rights under these discrimination laws. I believe that the company's policy of requiring persons over forty to release age discrimination claims against the company in order to secure enhanced separation benefits

> violates these age discrimination laws since persons under forty may elect to receive enhanced separation benefits determined by the same formula that applies to persons over forty without releasing potential age discrimination claims.

Letter from DiBiase to Mossett of April 29, 1992, at app. 106, 107. Because DiBiase did not sign the release, SmithKline refused to give him the enhanced benefits. See Letter from Tyrone Barber, SmithKline's Personnel Manager, to DiBiase of May 4, 1992, at app. 108. Still, DiBiase received the benefits due him under SmithKline's basic plan. Id.

On July 2, 1992, DiBiase filed an affidavit and charge with the Equal Employment Opportunity Commission (EEOC) alleging both that SmithKline terminated his employment because of his age, and that SmithKline's separation plan violated the ADEA because it treated older workers differently than younger workers by requiring them to release ADEA claims. DiBiase EEOC aff. at app. 109-110. On March 31, 1993, the EEOC determined that "there is not reasonable cause to believe that there has been a violation of the statute under which the charge has been filed." EEOC Determination at app. 67-68.

On June 14, 1993, DiBiase filed a complaint against SmithKline in the United States District Court for the Eastern District of Pennsylvania. His amended complaint contained two counts.

Count 1 asserted that SmithKline fired him because of his age, in violation of the ADEA. Complaint P 15-19 at app. 55-56. Count 2 alleged that SmithKline's "separation benefit plan violates ADEA because it discriminates against [him] and its other employees forty or older by having higher requirements for them to qualify for the additional separation benefits than apply to its employees under forty." Complaint P 29 at app. 58. DiBiase also asserted that SmithKline's actions underlying both counts were willful and that he was entitled to punitive and double damages. Complaint PP 19, 31 at app. 56, 59. On August 2, 1993, SmithKline moved to dismiss count 2 of the amended complaint, pursuant to Fed. R. Civ. P. 12(b)(6). In a Memorandum opinion and order filed on September 29, 1993, the district court denied the motion. The district court suggested that DiBiase might be able to show that even if SmithKline's plan was a "facially neutral employment" policy, it "had a significantly discriminatory impact." Memorandum Op. at app. 47.

On December 20, 1993, SmithKline moved for summary judgment on both counts of DiBiase's complaint. In an opinion and order dated March 15, 1994 -- entered the next day and reported at 847 F. Supp. 341 (E.D. Pa. 1994) -- the district court granted the motion as to Count 1 and denied it as to Count 2. Specifically, the district court found that "no jury reasonably could conclude from the facts" that DiBiase had been replaced in his job. 847 F. Supp. at 346. Inasmuch as

DiBiase had not been replaced, the court concluded that he had failed to establish a prima facie case of wrongful termination under the ADEA. Thus, the district court granted summary judgment to SmithKline on the termination count, count 1.[2]

However, the district court denied SmithKline's motion for summary judgment on count 2. Specifically, the court found that the separation plan involved

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[2] Ordinarily, when employment is terminated as part of a RIF, the plaintiff need not prove that he or she was replaced by a worker outside the protected class. Rather, to demonstrate a prima facie case "in RIF cases, the plaintiff must show he was in the protected class, he was qualified, he was laid off and other unprotected workers were retained." Armbruster v. Unisys Corp., 32 F.3d 768, 777 (3d Cir. 1994). Here, the district court found that "plaintiff cannot make such a showing, however, because all three retained employees . . . were within the protected class when plaintiff was terminated." DiBiase, 847 F. Supp. at 345 n.5. Thus, the district court used the standard for establishing a prima facie case in the typical age discrimination case. We need not address whether the district court appropriately departed from traditional RIF analysis, because DiBiase has not appealed from the summary judgment on count 1.

discriminatory treatment of older persons. Relying on the ADEA section providing a cause of action only for persons at least 40 years old, see 29 U.S.C. Sec. 631(a), the district court observed that "in order for an older employee to receive the same enhanced benefit as a younger employee, the older employee must release her right to file an ADEA claim." DiBiase, 847 F. Supp. at 347. The court further observed that "this treatment is patently different because the younger employee cannot have an ADEA claim." Id. From these observations, the district court concluded that "SmithKline's policy facially discriminates" against employees protected by the ADEA. Id. at 348. Thus, the court denied SmithKline's motion.

On April 26, 1994, DiBiase made a cross-motion for summary judgment on count 2 of the amended complaint, based entirely on the district court's reasoning in its March 15, 1994 opinion.[3] On May 3, 1994, the district court granted this motion, "for the reasons fully set forth in my March 15, 1994 Opinion." May 3, 1994 Order at n.1.

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[3] Technically this motion was not a cross-motion, since it was made after the district court's order on the original motion. Nonetheless, the district court, the parties and the docket sheet describe it as a "cross-motion" and we follow suit.

Because the parties had stipulated to damages under count 2, the district court entered judgment for DiBiase in the amount of $ 14,203.03. Id.[4]

Meanwhile, on December 16, 1993, DiBiase had filed another action alleging that SmithKline had retaliated against him for pursuing his rights under the ADEA. On December 22, 1993, the district court consolidated the two actions. The parties settled the retaliation claim, and on April 29, 1994, the district court signed a stipulation and order (entered on May 2, 1994) dismissing that claim with prejudice. Thus, the May 3, 1994 order granting DiBiase's motion for summary judgment on count 2 concluded the proceedings before the district court. SmithKline timely filed a notice of appeal. We have jurisdiction pursuant to 28 U.S.C. Sec. 1291 and the district court had subject matter jurisdiction pursuant to 29 U.S.C. Sec. 626(c) and 28 U.S.C. Sec. 1331.

We exercise plenary review over the district court's grant of summary judgment, Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co., 998 F.2d 1224, 1230 (3d Cir.), cert. denied, 114 S. Ct. 554 (1993), and, because the facts are undisputed, we decide the appeal as a matter of law.

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[4] It is unclear how the parties arrived at this figure.

II. DISCUSSION

A. Introduction

This case involves the scope of liability under the ADEA, a federal anti-discrimination statute that renders it unlawful for an employer:

> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
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> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age.

29 U.S.C. Sec. 623(a).[5] With these provisions, "the ADEA 'broadly prohibits

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[5] We generally rely on both ADEA cases and cases arising under Title VII of the Civil Rights Act of 1964, 42 U.S.C. Sec. 2000e, et seq., because "Title VII and the ADEA have been given parallel constructions due to their similarities in purpose and structure." Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380, 1385 n.4 (3d Cir. 1994).

arbitrary discrimination in the workplace based on age.'" Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 120, 105 S. Ct. 613, 621, 83 L. Ed. 2d 523 (1985) (quoting Lorillard v. Pons, 434 U.S. 575, 577, 98 S. Ct. 866, 868, 55 L. Ed. 2d 40 (1978)).[6] In a "privilege of employment" case such as this one, it is irrelevant that SmithKline had no obligation to provide the particular benefit to its employees, for once an employer decides to grant an opportunity to some, "it may not deny this opportunity to others because of their age." Thurston, 469 U.S. at 121, 105 S. Ct. at 621. As the Supreme Court has explained, "'[a] benefit that is part and parcel of the employment relationship may not be doled out in a discriminatory fashion, even if the employer would be free . . . not to provide the benefit at all.'" Id. (alteration in original) (quoting Hishon v. King & Spalding, 467 U.S. 69, 75, 104 S. Ct. 2229, 2233-34, 81 L. Ed. 2d 59 (1984)).

SmithKline argues in the first instance that Congress, in enacting the Older Workers Benefit Protection Act, Pub. L. No. 101-43, 104 Stat. 978 (1990) (OWBPA), explicitly considered and rejected a provision entitling older workers to

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[6] As noted above, however, the statute provides that "the prohibitions in this chapter shall be limited to individuals who are at least 40 years of age." 29 U.S.C. Sec. 631(a).

extra consideration for release of ADEA claims.[7] The OWBPA set forth, among

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[7] Somewhat inexplicably, at oral argument DiBiase vigorously denied that his theory of the case required employers to provide extra consideration to older workers signing general releases. To the contrary, he said that a provision for extra consideration would violate the ADEA as well and that the only way in which older people would be treated the same as younger people would be to allow older people to sign a release agreeing to waive all claims except those under the ADEA.

However, this case has proceeded on the assumption that DiBiase was claiming extra consideration. In ruling on SmithKline's motion to dismiss, the district court stated that DiBiase "argues that an employer could secure a release of ADEA claims by offering additional consideration beyond that offered for a release of all claims except ADEA claims." Memorandum of September 27, 1993, at app. 47. Similarly, the district court commented in its opinion that "I have difficulty believing that the widespread industry practice of offering enhanced benefits in exchange for a release of potential claims is so fragile that a decision requiring additional consideration for a valid release of ADEA claims will cause the practice to expire." DiBiase, 847 F. Supp. at 351. In short, the district court certainly believed that DiBiase was asking for extra consideration.

other things, specific standards governing whether an employee's waiver of ADEA claims is valid. See 29 U.S.C. Sec. 626(f). SmithKline points out that early drafts of the OWBPA provided that a waiver of ADEA claims is valid only when:

> the rights or claims are waived in exchange for consideration in addition to anything of value -- (ii) that has been offered to a group or class of individuals under an early retirement incentive or other employment termination program.

See 135 Cong. Rec. Sec. 289-01, Sec. 356-57 (introduction of bill in Senate); 135 Cong. Rec. H 696-03, H 697 (introduction of bill in House of Representatives). SmithKline is correct in noting that Congress did not include

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At any rate, unless DiBiase is arguing that an employer never could secure a valid general release from a terminated employee protected by the ADEA, we perceive no analytical distinction between a claim for extra consideration and a claim that DiBiase should have been allowed to waive all claims except ADEA claims in exchange for the enhanced benefits. Both arguments seek special treatment. In the former situation, the older worker receives extra money. In the latter situation, the older employee preserves his or her ADEA claims.

the provision in the OWBPA. This history supporting SmithKline's position is significant and is entitled to some weight. See United States v. Alcan Aluminum Corp., 964 F.2d 252, 264-65 (3d Cir. 1992). However, we do not rely primarily on legislative history in resolving this case because, as the following discussion shows, it is evident that even if we disregard the history we must conclude that SmithKline's policy did not violate the substantive provisions of the ADEA.

With this said, we now assess whether SmithKline's policy of providing enhanced benefits only to terminated employees signing the release violated the ADEA. A policy can be discriminatory because of its treatment of or impact on employees. In a disparate treatment case "'the employer simply treats some people less favorably than others because of their race, color, religion [or other protected characteristics].'" Hazen Paper Co. v. Biggins, 123 L. Ed. 2d 338, U.S. , , 113 S. Ct. 1701, 1705 (1993) (first alteration added) (quoting Teamsters v. United States, 431 U.S. 324, 335 n.15, 97 S. Ct. 1843, 1855 n.15, 52 L. Ed. 2d 396 (1977)). On the other hand, disparate impact liability "'involves employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity.'" Id. (quoting Teamsters, 431 U.S. at 335 n.15, 97 S. Ct. at 1855 n.15).

DiBiase contends -- and the district court found -that older workers who signed SmithKline's release gave up more claims than younger workers who signed the release, since older workers, unlike younger workers, are protected by the ADEA. Because the argument is framed to contend that SmithKline treated older persons less favorably than younger persons, this articulation of the claim falls under the rubric of "disparate treatment."

B. Disparate treatment

As the Supreme Court has noted, "'disparate treatment . . . is the most easily understood type of discrimination.'" Hazen, U.S. at , 113 S. Ct. at 1705 (alteration added) (quoting Teamsters, 431 U.S. at 335 n.15, 97 S. Ct. at 1855 n.15). A successful disparate treatment case prevents an employer from intentionally engaging in discrimination or grants a remedy against it for such conduct. Thus, "disparate treatment . . . captures the essence of what Congress sought to prohibit in the ADEA." Id. at , 113 S. Ct. at 1706. For example, as the Supreme Court pointed out when considering an employment termination case, "it is the very essence of age discrimination for an older employee to be fired because the employer believes that productivity and competence decline with old age." Id. In a disparate treatment case, the trier of fact asks not whether the employer's otherwise nondiscriminatory policy has some adverse effect on members of the protected class,

but rather, "is 'the employer . . . treating "some people less favorably than others because of their [age]."'" U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 715, 103 S. Ct. 1478, 1482, 75 L. Ed. 2d 403 (1983) (emphasis added) (quoting Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577, 98 S. Ct. 2943, 2949, 57 L. Ed. 2d 957 (1978) (second internal quotation omitted)). Usually, disparate treatment involves an ad-hoc decision to treat an individual adversely because he or she is in a particular protected class. For example, in Anderson v. City of Bessemer City, 470 U.S. 564, 105 S. Ct. 1504, 84 L. Ed. 2d 518 (1985), the district court found disparate treatment liability based on sex when a city refused to hire a qualified woman for the position of recreation director. Id. at 580, 105 S. Ct. at 1515. "Whatever the employer's decision-making process, a disparate treatment claim cannot succeed unless the employee's protected trait actually played a role in that process and had a determinative influence on the outcome." Id. at , 113 S. Ct. at 1706. Nonetheless, the district court found, and DiBiase argues, that he did not have to meet this test, because the policy constitutes explicit facial discrimination.

We agree that when a policy facially discriminates on the basis of the protected trait, in certain circumstances it "may constitute per se or explicit [age] discrimination." EEOC v. Elgin Teachers Ass'n, 780 F. Supp. 1195, 1197 (N.D. Ill. 1991). And, "whether an

employment practice involves disparate treatment through explicit facial discrimination does not depend on why the employer discriminates but rather on the explicit terms of the discrimination." Int'l Union, UAW v. Johnson Controls, Inc., 499 U.S. 187, 199, 111 S. Ct. 1196, 1204, 113 L. Ed. 2d 158 (1991). This is because, in a facial disparate treatment case, the protected trait by definition plays a role in the decision-making process, inasmuch as the policy explicitly classifies people on that basis. Thus, when the policy itself displays the unlawful categorization, the employee is relieved from independently proving intent. See Hazen, U.S. at , 113 S. Ct. at 1705 (while "'proof of discriminatory motive is critical, . . . it can in some situations be inferred from the mere fact of differences in treatment. . . .'") (citation omitted).

The district court based its conclusion that the policy constitutes facial discrimination on the following reasoning. The ADEA provides a cause of action only to persons age 40 or older. By its terms, then, the ADEA differentiates employees on the basis of age, and leaves younger workers unprotected by the statute.[8] Thus, on

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[8] As one court has noted, "the House Report for [the ADEA] cited the example of airline stewardesses, who must apparently 'retire' by the age of 32, as people beset by an obvious age discrimination problem, yet who will have

their 40th birthday, workers gain a substantive, valuable right. By contrast, nearly all other judicially enforceable rights apply to all persons, not to persons whose immutable characteristic falls in a particular category. For example, Title VII of the Civil Rights Act of 1964 protects not just black workers, but whites as well. Males as well as females may bring successful gender-discrimination suits. And, in states with statutes prohibiting discrimination on the basis of sexual orientation, presumably heterosexuals are protected as well as homosexuals. The district court next reasoned that, because the ADEA does not protect younger workers, while these other rights apply to all, older workers by definition hold a total number of rights greater than the total number of rights younger workers hold. Hence, if younger workers hold rights with the total value of x, older workers have x + 1 rights. In light of this analysis, the court reasoned that older terminated workers have more accrued claims to give up than younger workers. Thus, in order to comply with the ADEA, SmithKline should have given extra consideration to older workers because by signing the release they were giving up more claims than younger workers. Accordingly, the court concluded

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no remedy under the [ADEA]." Kodish v. United Airlines, Inc., 463 F. Supp. 1245, 1249 (D. Colo. 1979), aff'd, 628 F.2d 1301 (10th Cir. 1980).

that, by treating older workers the same as younger workers, SmithKline facially and explicitly discriminated on the basis of age.

We reject the district court's reasoning and thus we hold that it erred in concluding that SmithKline's policy is facially discriminatory and therefore constitutes per se discrimination. The touchstone of explicit facial discrimination is that the discrimination is apparent from the terms of the policy itself. In Thurston, for example, an airline company's policy constituted facial discrimination independent of proof of intent because it allowed all disqualified pilots automatically to be transferred to the position of flight engineer except those disqualified on the basis of age. Thurston, 469 U.S. at 121, 105 S. Ct. at 622. In Johnson Controls, 499 U.S. at 197, 111 S. Ct. at 1202, the policy at issue violated Title VII because it "excluded women with childbearing capacity from lead-exposed jobs and so created a facial classification based on gender." Similarly, Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 98 S. Ct. 1370, 55 L. Ed. 2d 657 (1978), prohibited a policy that facially "required 2,000 individuals to contribute more money into a fund than 10,000 other employees simply because each of them [was] a woman, rather than a man." Id. at 711, 98 S. Ct. at 1377.

But SmithKline's policy does not fall within that limited category of cases.

Its plan cannot be said to be discriminatory on its face, because the district court's conclusion that the plan is facially discriminatory required referencing a fact outside the policy -- namely the ADEA. Consider the district court's holding: "Because ADEA provides a cause of action for age discrimination only to persons age forty and above, the Plan explicitly treats older employees differently than younger employees." DiBiase, 847 F. Supp. at 347. But the word "explicitly" does not belong. It is impossible to examine SmithKline's policy and conclude that on its face it treats older workers disparately. There is a good reason for this -- the policy does not classify persons on the basis of age. On the contrary, the plan offering is an archetypical example of a facially non-discriminatory policy. SmithKline made the expanded package available to all persons willing to sign the release, regardless of age. SmithKline did not require employees to waive only ADEA claims, but to waive all claims. A facially non-discriminatory policy cannot be transformed into a facially discriminatory policy simply because of

the existence of the ADEA.[9]

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[9] While our result is not dependent on this point, we observe that certain precedents suggest that the premise that only employees 40 or over have anything to surrender under the ADEA is wrong. Thus, it has been held that employees under the age of 40 may bring retaliation claims under section 4(d) of the ADEA, see Anderson v. Phillips Petroleum Co., 722 F. Supp. 668, 671-72 (D. Kan. 1989). Moreover, at least two courts have held that, despite the statutory provision to the contrary, workers under the age of 40 may have standing to sue for substantive age discrimination. In Johnson v. Mayor and City Council of Baltimore, 515 F. Supp. 1287, 1301 (D.Md. 1981), rev'd on other grounds, 731 F.2d 209 (4th Cir. 1984), the court held that a 32year old plaintiff had standing to challenge the company's early retirement policy because "[the standing] provision does no more than define the acts prohibited by the statute and would not deprive plaintiff . . . of standing in this case." Id. In Allen v. American Home Foods, Inc., 644 F. Supp. 1553, 1558 (N.D. Ind. 1986), the court held that employees under 40 had standing to sue under the ADEA when they were terminated in the wake of a plant closing. Our point is not that these cases were decided correctly, a conclusion we neither reach nor reject. Rather, our point is that the provisions of the ADEA -- and how they are interpreted -- are outside an employer's

Thus, DiBiase is left with having to prove both unequal treatment and intent to discriminate. See Hazen, U.S. at , 113 S. Ct. at 1705; Armbruster v. Unisys Corp., 32 F.3d 768, 782 (3d Cir. 1994); Fuentes v. Perskie, 32 F.3d 759, 764 (3d Cir. 1994). The Supreme Court plainly has stated that "there is no disparate treatment under the ADEA when the factor motivating the employer is some feature other than the employee's age." Hazen, U.S. at , 113 S. Ct. at 1705. Here, the record does not contain even the slightest evidence of discriminatory motive.[10] At any

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control. Moreover, the 30-year old's suit certainly imposes costs upon the company, and once the suit is filed, it cannot be said that the costs will be contained by an early dismissal. These facts make it even more difficult to make the blanket statement that older persons' claims are worth more than younger persons' claims. See generally Typescript at 21-24.D

[10] In Hazen, the Supreme Court held that discrimination based on pension eligibility (when pension eligibility was based on years of service) does not violate the ADEA despite the strong correlation between the two categories. The Court did say, however, that "we do not preclude the possibility that an employer who targets employees with a particular pension status on the assumption that these employees are likely to be older thereby engages in age discrimination. Pension status may be a

rate, even assuming the existence of a legitimate factual dispute concerning SmithKline's motive, it simply did not discriminate against DiBiase on the basis of age. Again, we begin with the district court's reasoning. The district court properly concluded that employees gain a valuable substantive right simply by turning 40 for the ADEA protects workers who are at least 40 years of age from age discrimination. 29 U.S.C. Sec. 631(a). But the district court went on to reason that all 40-year old employees had accrued ADEA "claims " that necessarily rendered their bundle of accrued claims

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proxy for age . . . in the sense that the employer may suppose a correlation between the two factors and act accordingly." Hazen, U.S. at , 113 S. Ct. at 1707. Here, there is nothing in the record to indicate that SmithKline, by offering the general release, intended to target older workers. In fact, its motive is quite obvious -- it wanted to protect itself against all litigation arising out of the RIF.

DiBiase also contends that the intent to discriminate can be inferred based on his letter to SmithKline charging SmithKline with violating the ADEA. We disagree. The logical consequence of the argument is that a terminated employee can manufacture an illicit intent on the part of the employer simply by telling the employer that he or she thinks the employer is violating an anti-discrimination law.

more valuable than younger employees' bundles. Thus, the district court's reasoning assumes that all terminated employees with races or with genders have accrued potential Title VII claims against their former employers, and that terminated employees with sexual orientations have such potential claims under various relevant state laws. The court's reasoning also assumes that all such accrued claims are equally valuable. To take the principle where it logically leads, it is like saying every person has accrued a potential due process claim simply because he or she has been a person and hence has been protected by the Fifth and Fourteenth amendments.

This kind of reasoning is inappropriate because the ADEA claim was just one of a plethora of claims that SmithKline asked employees to waive. Thus, the value of the accrued ADEA claim has to be weighed against the value of other accrued claims. For instance, other things being equal, a terminated employee's potential accrued gender discrimination claim probably would be worth more if the employee were a woman, even though both men and women are protected by Title VII. Similarly, assuming all other variables to be equal, a black employee's race discrimination claim may be worth more in the abstract than such a claim from a white employee. Recognizing these possibilities inevitably leads us away from the abstract reasoning utilized by the district court into a more practical approach that recognizes that the value of a bundle of accrued claims depends on

a myriad of factors including, among other things, the employee's work performance history, the circumstances surrounding the terminations, and the nature -- if any -- of the rehiring. For example, a 35-year-old black employee terminated despite a stellar work performance record certainly has a more valuable claim under Title VII than a 55-year-old, fired because of incompetence, has under the ADEA. In theory, if there were a market for accrued claims, terminated 40-year old employees would not receive automatically the highest bids, as buyers would want to know more facts about the circumstances surrounding individual terminations. The point, of course, is that the district court's assumption, that because of the ADEA all 40-year old employees have a more valuable set of claims than younger workers, is simply wrong. One cannot say in the first instance that the 50-year-old's accrued "claims" are by definition worth more than others' accrued claims.

The fallacy in the district court's reasoning is in large part due to the conflation of the notion of a "right" with the notion of an accrued "claim." A right to be free prospectively from certain forms of discrimination always is worth something; however, whether a person has accrued a claim based on a right depends entirely on what previously has occurred. SmithKline did not ask its terminated employees to give up their statutorily or constitutionally created rights to be free prospectively of

various forms of discrimination. Rather, the plan's focus was entirely retrospective, on whether the value of any claims -- by definition already accrued -- was worth surrendering for the enhanced benefits. The significance of the distinction between a right and a claim is particularly demonstrated in this case because the district court found that DiBiase's substantive age discrimination claim had no merit.

In fact, the district court's reasoning and conclusion are at odds with propositions of law it acknowledges in its opinion. The court correctly noted that the ADEA "focuses on individuals, and precludes treatment of individuals as simply components of an age-based class." DiBiase, 847 F. Supp. at 347. By analogy, in Manhart, the pension policy violated Title VII despite the fact that it was based on legitimate actuarial calculations, because "the basic policy of the statute requires that we focus on fairness to individuals rather than fairness to classes." Manhart, 435 U.S. at 709, 98 S. Ct. at 1376. This is because "practices that classify employees in terms of religion, race, or sex [or age] tend to preserve traditional assumptions about groups rather than thoughtful scrutiny of individuals." Id. Yet the district court's reasoning turns this principle on its head. Here, SmithKline enacted a policy that called for each individual to weigh the circumstances surrounding his or her discharge, and to make an informed decision about whether to sign the

release or proceed with claims that, if they existed, already had accrued. Thus, the policy certainly was fair to individuals. Yet, the district court's opinion, by conflating prospective rights with accrued claims, ignored the variances in each individual's situation, and instead classified all persons who were at least 40 years old as being in the identical position. The opinion thus reached a conclusion directly contrary to the policy it correctly enunciated.

We must emphasize that our result may have been different had there been no analytical distinction between the class of disadvantaged employees (assuming such a class) and the protected class -- that is, had older employees by definition given up more claims than younger employees. In this regard, Hazen again is instructive. Although the Court concluded that "age and years of service are analytically distinct," Hazen, U.S. at , 113 S. Ct. at 1707, it expressly declined to "consider the special case where an employee is about to vest in pension benefits as a result of his age, rather than years of service." Hazen, U.S. at , 113 S. Ct. at 1707. The correlation between age and pension status in that special case is materially different -- the terminated employee always will be a member of the protected class. The point is important, because we would have faced a different situation if, for example, SmithKline conditioned the expanded separation package upon a waiver only of ADEA claims inasmuch as employees do in fact gain a substantive

right when they turn 40. Thus, assuming no knowledge of the circumstances surrounding the termination, the possibility that a terminated older employee actually has a viable age discrimination claim, is worth something (though probably not much) in the abstract. It follows, then, that if SmithKline required terminated employees to give up only ADEA claims to obtain the enhanced benefits, older employees but not younger employees would be forced to give up something of value.[11]

In the foregoing scenario, SmithKline would have treated older workers differently than younger workers. Thus, in EEOC v. Westinghouse Electric Corp., 869 F.2d 696 (3d Cir. 1989), vacated and remanded, 493 U.S. 801, 110 S. Ct. 37 (1989), we held that a policy denying severance pay to laid-off employees who were eligible for early or selected retirement constituted discrimination on the basis of age. There, the class of people eligible for early retirement always coincided with members of the protected class. Id. at 705.[12] But that

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[11] But see footnote 9, supra.

[12] The Supreme Court remanded Westinghouse for reconsideration in light of Public Employees Retirement System of Ohio v. Betts, 492 U.S. 158, 109 S. Ct. 2854, 106 L. Ed. 2d 134 (1989). In Betts, the Supreme Court held that the then-existing section 4(f)(2) of the ADEA -exempting from the ADEA's prohibitions

is not the situation here and we decline to address how we would rule in such a case. SmithKline conditioned the right to the expanded benefits on an employee's blanket waiver of all accrued claims; this treatment cannot be said to be disparate, because it is impossible to tell whose package of potential claims is more valuable.[13] Therefore, in light of

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"any bona fide employee benefit plan . . . which is not a subterfuge to evade the purposes of the Act" -- insulates bona fide plans from the purview of the ADEA "so long as the plan is not a method of discriminating in other, non-fringe-benefit aspects of the employment relationship." Id. at 177, 109 S. Ct. at 2866. Congress since overruled Betts. We cite Westinghouse solely for the proposition that when a company's policy distinguishes employees on the basis of a factor analytically indistinct from age, we would be faced with a different situation than that in this case.

[13] The National Employment Lawyers Association has filed an amicus brief relying in part on EEOC v. Board of Governors, 957 F.2d 424 (7th Cir.), cert. denied, 121 L. Ed. 2d 223, U.S. , 113 S. Ct. 299 (1992). In that case, the Court of Appeals for the Seventh Circuit held that "a collective bargaining agreement provision that denies employees their contractual right to a grievance proceeding whenever the employee

the above, DiBiase has no disparate treatment claim against SmithKline.

C. Disparate Impact

1. Whether DiBiase adequately has raised this issue

An amicus, the National Employment Lawyers Association (NELA), urges us to affirm the district court's judgment on the alternative theory of disparate impact. In a disparate impact case, the plaintiff claims that the employment practice "has a disproportionate effect on older workers [and thus] violates the ADEA." Hazen, U.S. at , 113 S. Ct. at 1710 (Kennedy, J. concurring). While the district court indicated that it

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initiates a claim, including a claim of age-based discrimination, in an administrative or judicial forum", id. at 425, violates section 4(d) of the ADEA. Id. at 431. Section 4(d) prohibits employers from retaliating against an employee "because such individual . . . has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding or litigation under this chapter." 29 U.S.C. Sec. 623(d). The company's policy therefore commanded a violation of this provision anytime an employee filed an age discrimination charge with the EEOC. This decision does not support DiBiase's position.

"need not determine whether the policy also constitutes disparate impact," DiBiase, 847 F. Supp. at 348 n.13, it nevertheless went on to say:

> Disparate impact cases typically focus on statistical disparities between members of the protected and unprotected classes. In this case, however, no statistics are necessary because all members of the age-protected class must surrender potential age discrimination claims, whereas no member of the non-protected class has potential age discrimination claims to surrender. Thus, a disparate impact analysis in this case involves arguments identical to those involved in the disparate treatment inquiry, and results in the same conclusion: SmithKline's policy causes a disparate impact because it specifies different treatment.

Id. (citation omitted; emphasis in original). The district court's observation about disparate impact assumes that older workers signing the release gave up more than younger workers solely because the ADEA protects only older workers. In light of our discussion above, that analysis is flawed fundamentally. Moreover, the district court's reasoning is somewhat circular -- in explaining why there is disparate impact liability, the court assumed the conclusion of its disparate treatment analysis. That logical flaw makes the disparate impact analysis redundant: To

say that there is disparate impact because there is disparate treatment is to say nothing at all. Of course, if a policy is facially discriminatory, it has a disparate impact on the discriminated-against individuals. Therefore, we reject the district court's disparate impact conclusion for the reasons detailed above.[14]

But the question remains -- should we still remand the matter for further proceedings (and perhaps further discovery) on a different type of disparate impact theory. After all, to conduct a disparate impact analysis properly in this context, the court should have assumed that the release did not treat employees disparately, and then

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[14] The problem with the district court's analysis probably stems from the fact that the court explicitly indicated that it need not reach the issue of disparate impact. See DiBiase, 847 F. Supp. at 348 n.13; Br. Amicus Curiae of National Employment Lawyers Association at 7 (acknowledging that district court determined that it need not decide whether the severance plan constitutes unlawful disparate impact). The language following the district court's disclaimer constituted simply a reflection on the import of the court's disparate treatment conclusion -once a policy is deemed facially discriminatory, the policy has a disparate impact as well.

asked whether, in reality, the policy had a disproportionate effect on older employees. Such an inquiry, of course, would have required use of sophisticated statistical data, and DiBiase apparently was not inclined to take this path, as he produced no such evidence.

DiBiase does not urge us to reach this conclusion as an alternative way to uphold the district court's judgment if we reject the court's disparate treatment analysis. Only the amicus argues that DiBiase's "ADEA claims are actionable under a disparate impact theory," NELA Br. at 7, but an "amicus may not frame the issues for appeal." Swan v. Peterson, 6 F.3d 1373, 1383 (9th Cir. 1993) (citing Sanchez-Trujillo v. I.N.S., 801 F.2d 1571, 1581 n.9 (9th Cir. 1986), cert. denied, U.S. , S. Ct. , 1994 U.S. LEXIS 7855 (1994). Absent the existence of "substantial public interests" calling us to depart from the general rule, "we consider only issues argued in the briefs filed by the parties and not those argued in the briefs filed by interested nonparties." Continental Ins. Cos. v. Northeastern Pharmaceutical & Chem. Co., Inc., 842 F.2d 977, 984 (8th Cir. 1988), cert. denied, 488 U.S. 821, 109 S. Ct. 66, 102 L. Ed. 2d 43 (1988); Preservation Coalition, Inc. v. Pierce, 667 F.2d 851, 862 (9th Cir. 1982).[15]

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[15] SmithKline addresses disparate impact theory, apparently to protect itself lest we conclude that the district court adequately reached the issue.

Therefore, because DiBiase is not pursuing a disparate impact claim, the issue is not before us.

2. The availability of disparate impact theory in this case[16]

We note, however, that even if the issue properly were before us, disparate impact theory would not be applicable here. In a factual scenario remarkably like the one here, the Supreme Court held that there can be no disparate impact liability. In Manhart, the City of Los Angeles argued that its pension policy requiring women to contribute greater amounts into a pension fund than men was mandated by Title VII itself, reasoning that "a gender-neutral pension plan would itself violate Title VII because of its disproportionately heavy impact on male employees." Manhart, 435 U.S. at 710 n.20, 98 S. Ct. 1370, 1376 n.20. The Court dismissed the argument out of hand: "Even under Title VII itself -- assuming disparate-impact analysis applies to fringe benefits -- the male employees

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[16] Judge Becker does not join subsection II(C)(2) and II(C)(3) of the opinion. He would say simply that DiBiase clearly abjured any intention to proceed under a disparate impact theory, and therefore there is no disparate impact claim before us.

would not prevail. Even a completely neutral practice will inevitably have some disproportionate impact on one group or another. . . . This Court has never held . . . that discrimination must always be inferred from such consequences." Id. That case, like this one, involved an employer's grant of "fringe benefits." There, the city argued that it was required to treat people unequally in order to treat them equally. Here, DiBiase makes the identical argument -- that SmithKline was required to treat employees unequally in order to treat them equally. Like in Manhart, the disparate treatment is alleged to be justified because older people as a group would otherwise pay more for the privilege than younger people.

Moreover, the facts of this case simply do not implicate the policies underlying disparate impact theory. In the first place, as described in detail above, the policy does not per se affect older workers more harshly than younger workers. Second, there is absolutely no evidence that the company's policy does in fact affect older people adversely. Third, even if it did, such a neutral policy -- which does not rely on an invidious stereotype about older employees, which clearly is not motivated by a discriminatory impulse, and which could be demonstrated to have a disparate impact only by the use of an incredibly sophisticated statistical analysis -- simply cannot be the basis of ADEA liability. Fourth, this is not a case where finding liability would help

eradicate the entrenched effects of past discrimination. Finally, use of statistical evidence demonstrating a disproportionate impact will shed little light on the employer's motive. In short, there can be no liability in this case based on disparate impact.

3. Disparate impact theory under the ADEA[17]

Moreover, in the wake of Hazen, it is doubtful that traditional disparate impact theory is a viable theory of liability under the ADEA. In Hazen, the Supreme Court stated that it was declining to decide whether an employer may be liable under the ADEA on a disparate impact theory. Id. at , 113 S. Ct. at 1706, id. at , 113 S. Ct. at 1710 (Kennedy, J. concurring); Markham v. Geller, 451 U.S. 945, 101 S. Ct. 2028, 68 L. Ed. 2d 332 (1981) (Rehnquist, J., dissenting from denial of certiorari). Yet the analysis in Hazen casts considerable doubt on the viability of the theory. And, in fact, we recently recognized that the existence of disparate impact theory under the ADEA is

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[17] Judge McKee does not join subsection II(C)(3) of the opinion, as he finds it unnecessary to consider the question of whether disparate impact theory liability is viable under the ADEA. Therefore, Judge Greenberg writes this subsection only for himself.

an open question. See Armbruster, 32 F.3d at 772 n.4 ("Whether a disparate impact theory of liability is even available under ADEA has yet to be addressed by the Supreme Court. In any event, because the district court has not yet addressed this issue, we think it would be inappropriate for us to consider it."). (Citations omitted).[18]

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[18] In Massarsky v. General Motors Corp., 706 F.2d 111 (3d Cir.), cert. denied, 464 U.S. 937, 104 S. Ct. 348, 78 L. Ed. 2d 314 (1983), we noted that "this court has never ruled on whether a plaintiff can establish a violation of the Act by showing disparate impact alone." Id. at 120. In MacNamara v. Korean Air Lines, 863 F.2d 1135 (3d Cir. 1988), cert. denied, 493 U.S. 944, 110 S. Ct. 349, 107 L. Ed. 2d 337 (1989), however, we said that "Title VII and ADEA liability can be found where facially neutral employment practices have a discriminatory effect or 'disparate impact' on protected groups, without proof that the employer adopted these practices with a discriminatory motive." Id. at 1148. That case is not controlling, however. First, there the plaintiffs challenged "the practice of favoring Korean nationals on the ground that it has the effect of discriminating against others on grounds of race or national origin." Id. Thus, the disparate impact allegation involved Title VII only, and the statement about the ADEA is pure dicta. Second, the cases relied upon for the proposition were Title VII cases,

Three premises in the Hazen Court's analysis make the point. First, though not explicitly deciding the viability of disparate impact liability under the ADEA, the Court did note that disparate treatment "captures the essence of what Congress sought to prohibit in the ADEA." Hazen, U.S. at , 113 S. Ct. at 1706. Second, the Court reasoned that "Congress' promulgation of the ADEA was prompted by its concern that older workers were being deprived of employment on the basis of inaccurate and stigmatizing stereotypes." Id. Finally, the Court held that "when the employer's decision is wholly motivated by factors other than age, the problem of inaccurate and stigmatizing stereotypes disappears. This is true even if the motivating factor is correlated with age . . . ." Id. In a pure disparate impact case, the employer's decision by definition is "wholly motivated by factors other than

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and in light of our express statement in Massarsky that Title VII jurisprudence did not necessarily apply to the ADEA in this context, it is inconceivable that we simply would have applied disparate impact theory without analysis -- particularly when the application was not relevant to the decision. Third, we decided MacNamara before Hazen, and subsequent Supreme Court authority necessarily controls.

age."[19] Thus, with the third premise, the Supreme Court apparently concluded that in such cases, the policies behind the ADEA are not implicated. With that said, it is difficult to see how disparate impact liability can survive the analysis.

The Court of Appeals for the Seventh Circuit and two district courts, relying in part on Hazen, recently held that disparate impact liability is unavailable under the ADEA. EEOC v. Francis W. Parker School, 41 F.3d 1073, 1077 (7th Cir. 1994) ("decisions based on criteria which merely tend to affect workers over the age of forty more adversely than workers under forty are not prohibited") (citing Anderson v. Baxter Healthcare Corp., 13 F.3d 1120 (7th Cir. 1993)); Martincic v. Urban Redevelopment Authority of Pittsburgh, 844 F. Supp. 1073, 1076-77 (W.D. Pa. 1994) (holding that in light of Hazen, there can be no disparate impact liability under the ADEA), aff'd, No. 94-3235, F.3d (3d Cir. Nov. 28, 1994) (table); Hiatt v. Union Pacific R.R. Co., 859 F. Supp. 1416, 1434 (D. Wyo. 1994) ("It is inappropriate to incorporate the disparate impact theory of discrimination enumerated [by the Supreme Court in the Title VII context]

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[19] I am not concerned here with situations in which impact is used to prove intent to discriminate.

into the ADEA.").[20]

The Hazen Court's emphasis on the congressional purpose behind the ADEA is particularly helpful in confirming the Court's intimations. First, the statutory language does not explicitly provide for disparate impact liability. While it has been argued that section 623(a)(2) authorizes claims of disparate impact, see Marla Ziegler, Disparate Impact Analysis and the Age Discrimination in Employment Act, 68 Minn. L. Rev. 1038,

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[20] Yet several courts of appeal have assumed that disparate impact liability applies under the ADEA. See, e.g., Geller v. Markham, 635 F.2d 1027, 1032 (2d Cir. 1980), cert. denied, 451 U.S. 945, 101 S. Ct. 2028, 68 L. Ed. 2d 332 (1981); Abbott v. Federal Forge, Inc., 912 F.2d 867, 872 (6th Cir. 1990); Rose v. Wells Fargo & Co., 902 F.2d 1417, 1423-25 (9th Cir. 1990). These cases were decided before Hazen, and none of them even purported to conduct any analysis of the issue. Rather, they probably relied on the oft-cited principle that interpretations of the ADEA parallel interpretations of Title VII. Because Hazen, if nothing else at least disposes of that assumption, those cases are not persuasive. However, even after Hazen, the Court of Appeals for the Eighth Circuit assumed -- again without analysis -- that disparate impact liability is cognizable under the ADEA. See Houghton v. Sipco, Inc., 38 F.3d 953, 958-59 (8th Cir. 1994).

1050-51 (1984), that reading of the statute is inaccurate. The section renders it "unlawful for an employer-

> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age.."

29 U.S.C. Sec. 623(a)(2). However, finding the theory lurking in this section requires reading the language "because of such individual's age" to modify "adversely affect" rather than to modify "limit, segregate, or classify." Because of the placement of the commas, this is a grammatically incorrect reading. See Pamela S. Krop, Note, Age Discrimination and the Disparate Impact Doctrine, 34 Stan. L. Rev. 837, 842-43 (1982). Moreover, as Krop points out, section (2) parallels the language of section (1), which makes it unlawful for an employer --

> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age.

29 U.S.C. Sec. 623(a). "Under this provision, the 'because of such individual's age' clause can only modify the description of prohibited actions . .

. . The parallel wording of section 4(a)(2) indicates that it too was aimed at disparate treatment. An employer may not limit, segregate, or classify employees on the basis of age in a manner that would adversely affect an employee." Krop at 843.

More than that, however, although the ADEA language quoted above parallels the language in Title VII, when the Supreme Court found disparate impact liability under Title VII, it relied not on any specific statutory language but on the policies behind the statute. In that case, Griggs v. Duke Power Co., 401 U.S. 424, 91 S. Ct. 849, 28 L. Ed. 2d 158 (1971), the Court stated:

> The objective of Congress in the enactment of Title VII . . . was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices.

Id. at 429-30, 91 S. Ct. at 853. This policy is not easily transplanted into the ADEA, the primary purpose of which is to prohibit employers from acting upon the assumption that "productivity and competence decline with old age." Hazen,

U.S. at , 113 S. Ct. at 1706. As one court has put it, "in Griggs, the critical fact was the link between the history of educational discrimination and the use of that discrimination as a means of presently disadvantaging African-Americans. These concerns simply are not present when the alleged disparate impact is based on age." Hiatt, 859 F. Supp. at 1436. Congress itself recognized this distinction, for it provided in the ADEA that "it shall not be unlawful for an employer . . . to take any action otherwise prohibited [by this section] where the differentiation is based on reasonable factors other than age . . . ." 29 U.S.C. Sec. 623(f)(1). "The sentence is incomprehensible unless the prohibition forbids disparate treatment and the exception authorized disparate impact." Metz v. Transit Mix, Inc., 828 F.2d 1202, 1220 (7th Cir. 1987) (Easterbrook, J. dissenting) (quoting Douglas Laycock, Continuing Violations, Disparate Impact in Compensation, and Other Title VII Issues, 49 L. & Contemp. Prob. 53, 55 (Aut. 1986) (referring to identical language of Equal Pay Act). In other words, by the statutory language itself, Congress recognized that neutral policies not motivated by discriminatory intent may be permissible employment practices. It is difficult to imagine how Congress could have concluded otherwise -- for application of disparate impact theory could lead to results which

Congress probably did not intend.[21]

But I need not go so far as to say that disparate impact theory is never available under the ADEA. Rather, resolution of that issue must await another day. I write this section to highlight my doubts and to say that, at any rate, disparate impact theory should not be applied as a matter of course. Here, of course, we only need hold that even if in some situations disparate impact liability may be established under the ADEA, this case does not present one of them.

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[21] For example, if an employer set the work week at five days per week, eight hours per day, or if it determined to eliminate medical insurance coverage, its decisions could have a disparate impact on older employees. In that circumstance, in an ADEA action employers would be forced to justify their business practices with older employees then having the opportunity to demonstrate that alternative employment practices could fulfill the employer's needs. See Abbott v. Federal Forge, Inc., 912 F.2d 867, 872 (6th Cir. 1990). Such a regime could subject employers to unreasonable intrusions by juries into their business practices. See Gray v. York Newspapers, Inc., 957 F.2d 1070, 1083 (3d Cir. 1992).

III. CONCLUSION

In view of the aforesaid, we hold that an employer may offer enhanced benefits to all terminated employees agreeing to waive all claims against the company, without providing extra consideration to workers protected by the ADEA. Thus, it is evident that the district court should have denied DiBiase's motion for summary judgment and should have granted SmithKline's motion for summary judgment on count 2 of the amended complaint. Furthermore, it is clear that there is no need for further proceedings in the district court. See Nazay v. Miller, 949 F.2d 1323, 1328 (3d Cir. 1991). Consequently, the order of May 3, 1994, granting DiBiase summary judgment will be reversed and the matter will be remanded to the district court for entry of judgment in favor of SmithKline. Inc.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOHN DIBIASE	:	
	:	
V.	:	NO. 93-3171
	:	
SMITH KLINE BEECHAM CORP.	:	

ORDER

AND NOW, this 2nd day of May 1994, it is hereby ORDERED that plaintiff's cross-motion for summary judgment (Document No. 70) on Count II of the amended complaint is GRANTED.

It is further Ordered that JUDGEMENT IS ENTERED IN FAVOR OF PLAINTIFF AND AGAINST DEFENDANT in the amount of

Fourteen Thousand Two Hundred Three Dollars and Three Cents ($14,203.03).[1]

By The Court

/s/ John R. Padova J.

ENTERED 5/3/94

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[1] Defendant previously filed motions to dismiss and for summary judgment on Count II of plaintiff's amended complaint. I denied the motion to dismiss by Memorandum and Order (Document No. 16) on September 27, 1993, and I denied the motion for summary judgment by Opinion and Order (Document No. 65) on March 15, 1994. Plaintiff now seeks summary judgment on Count II of the amended complaint. In response Defendant incorporates by reference the pleadings and defenses it submitted in support of the two previous motions. For the reasons set forth in my March 15, 1994 Opinion I shall grant Plaintiff's motion.

Defendant has agreed to stipulate that the damages related to Count II are $14,203.03. Accordingly I enter judgment for plaintiff in this amount.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOHN DIBIASE	:	
	:	
V.	:	NO. 93-3171
	:	
SMITH KLINE BEECHAM CORP.	:	

OPINION

PADOVA, District Judge. March 15, 1994

This case involves allegations of age discrimination in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C.A. sec. 621- 634 (West 1985 & Supp.1993). Plaintiff's amended complaint asserts two claims: Count I avers that defendant, SmithKline Beecham Corporation ("SmithKline"), discriminated based on age when it terminated Plaintiff's employment; Count II asserts that a waiver provision in SmithKline's separation benefit package violates ADEA. SmithKline filed this motion for summary judgment on both Counts of Plaintiff's amended complaint.[1] For the reasons set

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[1] On December 16, 1993, Plaintiff filed Civil Action No. 93-6802 alleging a retaliation claim. On December 22, 1993, I ordered the two cases consolidated. Civil Action No. 93-6802 was then closed, and that complaint is now part of this action. This motion for summary judgment, filed on December 20, 1993, does not address Plaintiff's retaliation

forth below, I shall grant SmithKline's motion with respect to Count I, but I shall deny summary judgment with respect to Count II.

I. BACKGROUND

SmithKline is a corporation that manufactures and markets pharmaceutical and consumer products, and was formed in 1989 as a result of a merger between SmithKline Beckman Corporation and Beecham Pharmaceuticals. Following the merger, SmithKline operated computer data centers at King of Prussia, Philadelphia, and Pittsburgh, Pennsylvania, and at Bristol, Tennessee.

During 1990, SmithKline consolidated the four separate data centers into a single center located at King of Prussia. Before consolidation, Plaintiff was employed as the first shift supervisor at the Philadelphia data center.[2] After

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claim, and I therefore will treat this motion as one for partial summary judgment.

[2] The other two shift supervisors at the Philadelphia data center were Alexander Fleming (second shift), and Michael Geraghty (third shift). The supervisors at the King of Prussia data center were Charles King (first shift), Fidel Santos (second shift), and James Denton (third shift). They remained in their respective shifts following

consolidation, six shift supervisors worked at the King of Prussia data center, two supervisors per shift, with each pair of supervisors overseeing the work of only 3-5 computer operators. Michael Oleksiuk, who had been manager of the Philadelphia data center, was transferred to the consolidated facility and became Manager of Data Center Operations, and the immediate superior of the six shift supervisors. In August 1991, after Geraghty transferred to an operations analyst position, five shift supervisors remained at the King of Prussia facility.

In December 1991, Katherine Holland, formerly the Director of Business Systems and Operations, assumed overall responsibility for the consolidated data center. Holland determined that only one shift supervisor was needed per shift, and decided in January 1992 to terminate two of the five remaining shift supervisors. Holland met with Oleksiuk and Tyrone Barber, the data center's personnel manager, to determine who should be laid off. Barber prepared an "adverse impact analysis" examining the gender, race, and age of the shift supervisors to determine if any adverse impact would result from the planned reduction in staff. On February 1, 1992, Holland met with Oleksiuk, Barber, and William Mossett, SmithKline's Vice President and Director of Corporate

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consolidation.

Personnel, and determined that Plaintiff and Fleming should be laid off. On February 2, 1992, Oleksiuk informed Plaintiff that his employment was terminated. At that time, Plaintiff was fifty-one years old.

As a terminated employee, Plaintiff was eligible for SmithKline's separation benefit plan ("the Plan"). The Plan included a lump sum payment based on length of service and three months continued health and dental benefits. The Plan also offered enhanced benefits to terminated employees who signed a general release of all claims against SmithKline. The enhanced benefits included a larger lump sum payment and six months continued health and dental coverage. Under the Plan, Plaintiff was entitled to a lump sum payment equal to fifteen months salary if he signed the release, or twelve months salary if he declined to sign the release. Plaintiff did not sign the general release.

Count I of Plaintiff's amended complaint asserts that SmithKline's decision to terminate Plaintiff's employment was part of a corporate plan to eliminate older workers from the corporation's payroll. Count II asserts that SmithKline's separation benefit plan violates ADEA because older workers must release more claims than younger workers to receive the same

enhanced benefits.[3]

II. STANDARD FOR SUMMARY JUDGMENT

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). An issue is "genuine" only if there is sufficient evidence with which a reasonable jury could find for the nonmoving party. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986). Furthermore, bearing in mind that all uncertainties are to be resolved in favor of the nonmoving party, a factual dispute is only "material" if it might affect the outcome of the case. See id. at 248, 106 S.Ct. at 2510.

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[3] ADEA provides a cause of action for age discrimination only for persons at least 40 years of age. 29 U.S.C.A. s 631(a) (West 1985 & Supp.1993). Plaintiff alleges, therefore, that employees age 40 and older must waive more claims, namely age discrimination, to receive the same enhanced benefits as employees under age 40.

A party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion and identifying those portions of the record that it believes demonstrate the absence of a genuine issue of material fact. See Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986). Where the non-moving party bears the burden of proof on a particular issue at trial, the movant's initial Celotex burden can be met simply by "pointing out to the district court that there is an absence of evidence to support the nonmoving party's case." Id. at 325, 106 S.Ct. at 2554. After the moving party has met its initial burden, summary judgment is appropriate if the non-moving party fails to rebut by making a factual showing "sufficient to establish an element essential to that party's case, and on which that party will bear the burden of proof at trial." Id. at 322, 106 S.Ct. at 2552.

III. DISCUSSION

SmithKline seeks summary judgment on both counts of Plaintiff's amended complaint. I shall address each count separately.

A. Plaintiff's Termination

ADEA makes it unlawful for an employer "to discharge any individual ... because of such individual's age." 29 U.S.C.A. Sec. 623(a)(1). In the absence of direct evidence, the plaintiff must first prove

a prima facie case of age discrimination. See Billet v. CIGNA Corp., 940 F.2d 812, 816 (3d Cir.1991); cf. Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121, 105 S.Ct. 613, 621-22, 83 L.Ed.2d 523 (1985). If the plaintiff establishes her prima facie case, a presumption of unlawful discrimination arises. Texas Dept. of Commun. Affairs v. Burdine, 450 U.S. 248, 254, 101 S.Ct. 1089, 1094, 67 L.Ed.2d 207 (1981). The burden of production then shifts to the defendant to rebut the presumption of discrimination by articulating legitimate, non-discriminatory reasons for the plaintiff's discharge. Id. If the defendant meets this burden of production, the presumption of unlawful discrimination "simply drops out of the picture." St. Mary's Honor Center v. Hicks, --- U.S. ----, ----, 113 S.Ct. 2742, 2749, 125 L.Ed.2d 407 (1993); see also Reiff v. Philadelphia County Court of Common Pleas, 827 F.Supp. 319 (E.D.Pa.1993) (applying Hicks to summary judgment analysis of age discrimination claim under ADEA). At that stage, the plaintiff, who always bears the burden of persuasion on the ultimate question of whether there has been discrimination, is not required to offer any additional proof of discrimination, but must present evidence refuting the defendant's articulated non-discriminatory reasons. Hicks, --- U.S. at ----, 113 S.Ct. at

2749, 2756.[4] Summary judgment for the employer is appropriate, therefore, if the plaintiff fails to make a factual showing sufficient to 1) establish her prima facie case; or 2) refute the defendant's articulated non-discriminatory reasons. SmithKline asserts that Plaintiff cannot establish his prima facie case, and that even if he could establish a prima facie case, Plaintiff has not offered evidence refuting SmithKline's proffered nondiscriminatory reasons.

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[4] To satisfy her ultimate burden of persuasion, the plaintiff must prove "both that the [defendant's] reason was false, and that discrimination was the real reason." Hicks, --- U.S. at ----, 113 S.Ct. at 2752. "The factfinder's disbelief of the reasons put forward by the defendant ... may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination." Id. at ----, 113 S.Ct. at 2749. Once the employer meets its burden of production, therefore, the plaintiff may not simply rest her case. Although she need not present any additional proof of discrimination, the plaintiff must introduce evidence refuting the employer's reasons; otherwise, the factfinder has no evidentiary basis upon which to reject the reasons.

A plaintiff may establish her prima facie case of age discrimination by proving that she "(1) belongs to a protected class; (2) was qualified for the position; (3) was dismissed despite being qualified; and (4) ultimately was replaced by a person sufficiently younger to permit an inference of age discrimination." Billet, 940 F.2d at 816 n. 3.[5] SmithKline does not dispute that Plaintiff belongs to the protected class, that he was qualified for the position, or that he was dismissed despite being qualified. SmithKline argues, however, that Plaintiff was not replaced. Plaintiff replies that he was replaced by Geraghty, an individual almost twenty years his junior. Plaintiff faces an arduous task, however, because he was not directly replaced by Geraghty. Instead, Plaintiff avers that SmithKline indirectly replaced him with Geraghty to conceal any hint of age discrimination.

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[5] Where the plaintiff's job is eliminated and she is not replaced, the plaintiff may establish her prima facie case by showing that she is in the protected class and was qualified for the job from which she was laid off, while other workers not in the protected class were retained. See Billet, 940 F.2d at 816 n. 3. Plaintiff in this case cannot make such a showing, however, because all three retained employees, King (age 46), Santos (age 51), and Denton (age 49), were within the protected class when Plaintiff was terminated. App. at 1422.

To support his replacement "theory," Plaintiff offers details of five separate events occurring over approximately thirteen months. First, in December 1991, Oleksiuk and Holland discussed whether Geraghty might return as a shift supervisor. Oleksiuk Aff. P 7. Second, at the same approximate time period, Barber included Geraghty's name on the Adverse Impact Analysis, even though Geraghty had transferred to an operations analyst position approximately four months earlier. App. at 1422. Third, Holland retained Denton and terminated Plaintiff, even though Oleksiuk ranked Denton lower than Plaintiff in terms of performance. Holland Dep. at 177-79; Oleksiuk Aff. P 4. Plaintiff asserts, with no evidentiary support, that Holland retained Denton specifically so that she could later "dispose of" him at any time due to his supposed incompetence. Pl.'s Reply Opp'n Def.'s Mot.Summ. J. at 21. Fourth, in late October 1992, approximately nine months after Plaintiff was terminated, Holland terminated

Denton because of poor performance.[6] Oleksiuk Aff. P 10. Fifth, in January 1993, almost one year after Plaintiff was terminated, and two months after Denton was terminated, Geraghty was asked to return as a shift supervisor to replace Denton. Geraghty Dep. at 73.

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[6] Denton's termination was effective November 3, 1992. App. at 1486.

Plaintiff's replacement theory fails for two independent reasons. First, because of the extended delay between Plaintiff's termination and Geraghty's return as a shift supervisor, there is an absence of evidence that Plaintiff was replaced. See, e.g., Rose v. Wells Fargo & Co., 902 F.2d 1417, 1422 (9th Cir.1990) (claim of replacement by a younger worker is substantially weakened when the replacement did not occur until six or seven months after plaintiff's discharge); Simpson v. Midland-Ross Corp., 823 F.2d 937, 941 (6th Cir.1987) (replacement claim questionable when replacement occurred three months after plaintiff's discharge). Additionally, Plaintiff has not offered facts showing that the shift supervisor position requires specialized knowledge or that the position normally goes unfilled for long periods of time, such that Geraghty's return almost one year after Plaintiff's termination might possibly be considered a replacement. See Powell v. Syracuse University, 580 F.2d 1150, 1156 (2d Cir.) (in the context of university employment, gap of two years between the non-renewal of a teaching contract and the hiring of a new teacher does not preclude a finding of "replacement," where teaching post requires specialized skills, hiring is very sporadic, and such positions normally are not quickly filled), cert. denied, 439 U.S. 984, 99 S.Ct. 576, 58 L.Ed.2d 656 (1978); Nordquist v. Uddeholm Corp., 615 F.Supp. 1191, 1199 (D.Conn.1985) (six month time lag between plaintiff's discharge and defendant's

advertisement of an open position does not preclude finding of replacement because the position required specialized knowledge and hiring decisions for such positions were made infrequently).

Second, because Plaintiff's theory is internally inconsistent, there is no genuine issue that Plaintiff was replaced. Initially, Plaintiff argues that Holland could not have based her decisions solely on performance because Denton "was not competent and had serious problems carrying out his third shift duties including sleeping during his shift." Pl.'s Reply Opp'n Def.'s Mot. Summ. J. at 14.[7] Additionally, Plaintiff avers that Holland "realized that Mr. Denton could be disposed of at any time because of his serious employment inadequacies." Id. at 21. Later, however, Plaintiff contends that Denton was competent, and that Holland wrongfully terminated Denton in October 1992 simply to replace him with the much younger Geraghty. Id.; Oleksiuk

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[7] As further support, Plaintiff asserts that Oleksiuk "wanted to reduce force by terminating Alex Fleming and James Denton because of their level of competence." Pl.'s Reply Opp'n Def.'s Mot. Summ. J. at 16. Additionally, Plaintiff asserts that Fleming and Denton were the obvious selections [for termination] because of their known lack of competence." Id. at 20.

Aff. PP 9-10. Thus, Plaintiff's replacement theory requires belief that Denton was so incompetent in February 1992 that Holland's decision to retain him and terminate Plaintiff was a pretext for later age discrimination, but also that Denton was sufficiently competent in October 1992 that Holland's decision to terminate Denton was a "setup," unjustified, and solely based on age bias. No jury reasonably could conclude from this inconsistent evidence that SmithKline replaced Plaintiff with Geraghty.[8]

Because Plaintiff has failed to offer facts sufficient to establish that he was replaced, and because no jury reasonably could conclude from the facts that Plaintiff has offered that he had been replaced by Geraghty, SmithKline is entitled to summary judgment on Count I

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[8] Further, the part of Plaintiff's argument asserting that Denton was incompetent requires belief that Holland was willing to tolerate retaining a known incompetent person as the sole third shift supervisor for nine months in order to discriminate against Plaintiff based on age. This scenario is highly unlikely, and undercuts Plaintiff's argument that he was replaced by Geraghty.

of Plaintiff's amended complaint.[9]

B. SmithKline's Separation Benefit Plan

As part of its separation benefit plan, SmithKline offered enhanced severance benefits[10] to terminated employees who

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[9] I note that the Court of Appeals for the Third Circuit has stated that "[b]ecause the prima facie case is easily made out, it is rarely the focus of the ultimate disagreement." Ezold v. Wolf, Block, Schorr & Solis-Cohen, 983 F.2d 509, 523 (3d Cir. 1992), cert. denied, --- U.S. ----, 114 S.Ct. 88, 126 L.Ed.2d 56 (1993). Moreover, a district court should not normally conclude that the plaintiff has failed to establish her prima facie case where the parties dispute the subjective issue of the plaintiff's qualification for the position. Id. However, where, as here, the plaintiff fails to establish an objective element, such as replacement, he has failed to establish an essential element of his prima facie case.

Because Plaintiff has failed to establish his prima facie case, I need not decide whether he has offered evidence refuting SmithKline's articulated non-discriminatory reasons for Plaintiff's termination.

[10] Employees with equivalent lengths of employment received the same enhanced benefits.

signed a general release of all claims against SmithKline. [11] SmithKline asserts that the Plan does not violate ADEA, and that Plaintiff's claim fails under both the disparate treatment and disparate impact theories of employment discrimination. I shall address these issues in turn. [12]

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[11] The general release provided in pertinent part that in exchange for consideration received, the employee waived, among other things:

> Any and all claims arising under federal, state or local constitutions, laws, rules or regulations or common law prohibiting employment discrimination based upon age, race, color, sex, religion, handicap or disability, national origin or any other protected category or characteristic, including but not limited to any and all claims arising under the Age Discrimination in Employment Act of 1967, ..., and/or under any other federal, state or local human rights, civil rights, or employment discrimination statute, rule or regulation.

App. at 1474.

[12] An unopposed amicus curiae brief supporting SmithKline's motion for summary judgment on Count II has been filed by the Equal Employment Advisory Council ("EEAC"). Unopposed amici curiae

Disparate treatment discrimination exists where "[t]he employer ... treats some people less favorably than others because of their race, color, religion [or other protected characteristics.] Proof of discriminatory motive is critical, although in some situations it can be inferred from the mere fact of differences in treatment." Hazen Paper Co. v. Biggins, --- U.S. ----, ----, 113 S.Ct. 1701, 1705, 123 L.Ed.2d 338 (1993). If the challenged employment policy is facially discriminatory, no further proof of intent is necessary. See U.A.W. v. Johnson Controls, Inc., 499 U.S. 187, 198-200, 111 S.Ct. 1196, 1203-04, 113 L.Ed.2d 158 (1991).

SmithKline's separation benefit policy constitutes disparate treatment because it facially discriminates based on age. By its express terms, SmithKline's Plan conditions enhanced benefits on the waiver of any and all claims arising under ADEA. Because ADEA provides a cause of action for age discrimination only to persons age forty and above, the Plan explicitly treats older employees

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briefs supporting Plaintiff's opposition to summary judgment on Count II have been filed by the American Association of Retired Persons ("AARP"), Action Alliance of
Senior Citizens of Greater Philadelphia, Inc., and Legal Services for the Elderly of New York City.

differently than younger employees. An employment policy explicitly mandating different treatment of persons within the protected class facially discriminates. See, e.g., Thurston, 469 U.S. at 121, 105 S.Ct. at 622. As the Supreme Court has noted, "[w]hether an employment practice involves disparate treatment through explicit facial discrimination does not depend on why the employer discriminates but rather on the explicit terms of the discrimination." Johnson Controls, 499 U.S. at 199, 111 S.Ct. at 1204.

SmithKline argues, however, that the Plan does not facially discriminate because all employees are required to release all claims to receive enhanced benefits. SmithKline is incorrect. In order for an older employee to receive the same enhanced benefit as a younger employee, the older employee must release her right to file an ADEA claim. This treatment is patently different because the younger employee cannot have an ADEA claim. Moreover, this difference in treatment is solely related to age.

Furthermore, the Plan discriminates against individual older employees. ADEA makes it unlawful to "discriminate against any individual with respect to [her] compensation, terms, conditions, or privileges of employment, because of such individual's age." s 623(a)(1) (West 1985) (emphasis added). The statute focuses on individuals, and precludes treatment of individuals as simply components of an age-based class. In this regard, Los Angeles Dept. of Water &

Power v. Manhart, 435 U.S. 702, 98 S.Ct. 1370, 55 L.Ed.2d 657 (1978) is highly instructive.

The Los Angeles Department of Water and Power administered its own retirement, disability, and death benefit programs for its employees. Id. at 702-05, 98 S.Ct. at 1373. The monthly retirement benefits for men and women of the same age, seniority, and salary were equal. Id. Based on a study of mortality tables showing that women, on average, outlive men, the Department required its 2000 female employees to make monthly contributions to its pension fund that were 14.84% higher than the contributions of its 10,000 male employees. Id. at 705-07, 98 S.Ct. at 1374. The Department contended that the differential was not prohibited by Title VII because the value of the average female employee's pension benefit was greater than that of the average male employee. Id. The Supreme Court rejected this argument, stating that "[e]ven a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply." Id. at 708, 98 S.Ct. at 1375. The Supreme Court concluded that

> An employment practice that requires 2,000 individuals to contribute more money into a fund than 10,000 other employees simply because each of them is a woman, rather than a man, is in direct conflict with both the language and the

> policy of [Title VII]. Such a practice does not pass the simple test of whether the evidence shows treatment of a person in a manner which but for that person's sex would be different.

Id. at 711, 98 S.Ct. at 1377 (internal quotation omitted). Similarly, an employment practice that requires older individuals to release more rights than younger workers simply because each of them is at least age forty, rather than below age forty, is in direct conflict with both the language and the policy of ADEA. Such a practice does not pass the simple test of whether the evidence shows treatment of a person in a manner which but for that person's age would be different.

SmithKline argues that it is incorrect to assume that an older employee gives up more than a younger employee because the older employee may not have a viable age discrimination claim. This argument is completely inapposite because SmithKline does not limit enhanced benefits solely to those employees willing to release all viable claims. Instead, SmithKline extends enhanced benefits to any employee willing to sign the release, regardless of whether the employee has viable claims. Additionally, all employees age forty and above are protected by ADEA, and therefore have potential age discrimination claims. Some older workers may have meritorious claims, while others may have no valid basis for claiming age

discrimination. But SmithKline's policy exchanges valuable consideration for the release of all potential claims, meritorious and meritless. Viability is immaterial, therefore, because SmithKline does not limit enhanced benefits solely to employees who release viable claims. Rather, the Plan targets the right to make claims, and explicitly discriminates because older workers only receive the benefit enhancement if they waive potential claims that younger workers simply cannot have.[13]

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[13] Because I conclude that SmithKline's enhanced separation benefit policy constitutes disparate treatment, I need not determine whether the policy also constitutes disparate impact. To establish a prima facie case of disparate impact, the plaintiff must show that the employer's facially neutral practice had a "significant discriminatory impact" on member's of the protected class. See Massarsky v. General Motors Corp., 706 F.2d 111, 120 (3d Cir.) (internal quotation omitted), cert. denied, 464 U.S. 937, 104 S.Ct. 348, 78 L.Ed.2d 314 (1983). Disparate impact cases typically focus on statistical disparities between members of the protected and unprotected classes. See, e.g., Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 987, 108 S.Ct. 2777, 2785, 101 L.Ed.2d 827 (1988). In this case, however, no statistics are necessary because all members of the age-protected class must surrender potential age discrimination claims, whereas no

Concluding that SmithKline's policy facially discriminates, however, does not end the inquiry, because ADEA permits a limited category of employment practices that explicitly discriminate based upon age. See s 623(f); see also Hazen, --- U.S. at ----, 113 S.Ct. at 1709 (stating that "ADEA is not an unqualified prohibition on the use of age in employment decisions"). Specifically, the statute states that "[i]t shall not be unlawful for an employer ... to observe the terms of a bona fide employee benefit plan where, for each benefit or benefit package, the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker." s 623(f)(2)(B)(i). An employer may only invoke this statutory exception, however, where a reduction in employee benefits is justified by age-related costs. See Older Workers Benefit Protection Act, S.Rep. No. 263, 101st Cong., 2d Sess. 12 (1990) [hereinafter Senate Report], reprinted in 1990 U.S.C.C.A.N. 1509, 1517

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member of the non-protected class has potential age discrimination claims to surrender. Thus, a disparate impact analysis in this case involves arguments identical to those involved in the disparate treatment inquiry, and results in the same conclusion: SmithKline's policy causes a disparate impact because it specifies different treatment.

(noting that limitation of s 623(f)(2) to benefit reductions justified by age-related cost considerations is consistent with congressional intent).[14] Where the employee benefit involves no age-related costs, however, such as paid vacation and uninsured paid sick leave, the statutory exception does not apply. See id. at 18, 1990 U.S.C.C.A.N. at 1524. Similarly, s 623(f)(2) does not apply to lump-sum severance pay. See id. at 12, 1990 U.S.C.C.A.N. at 1517 (citing with approval EEOC v. Borden's, Inc., 724 F.2d 1390 (9th Cir.1984), and EEOC v. Westinghouse Elec. Corp., 725 F.2d 211 (3d Cir.1983), cert. denied, 469 U.S. 820, 105 S.Ct. 92, 83 L.Ed.2d 38 (1984)). Because SmithKline's enhanced separation benefits are distributed in the form of a lump-sum severance payment involving no age-related costs, s 623(f)(2) does not apply.

Amicus EEAC asserts on behalf of SmithKline that the Plan does not require older workers to give more than younger workers to receive enhanced benefits, but that even if it did, the principle underlying s 623(f)(2) supports a

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[14] For example, an employer may provide lower life insurance coverage to an older worker than a younger worker where the cost to the employer for providing coverage to the older worker is equal to the cost for providing coverage to the younger worker. See, e.g., Senate Report at 19, 1990 U.S.C.C.A.N. at 1524.

conclusion that the Plan does not violate ADEA. Specifically, EEAC argues:

> Like the increased cost of some benefits due to age, a particular employee's membership in the ADEA protected class is a fact of life over which the employer has no control. Congress did not require employers to pay extra life insurance premiums so that older workers could be insured for the same amount as younger workers. In the same manner, Congress did not require employers to pay extra consideration in order to obtain a valid ADEA waiver.

EEAC Br. Supp. M. Summ. J. at 26. EEAC's analogy is fundamentally flawed because it misconstrues the nature of the statutory exception and the enhanced benefit policy. Although an employer may extend unequal benefits that have equal age-related costs (e.g., life insurance), it may not require unequal consideration (e.g., waiving ADEA claims), in exchange for equal lump-sum severance payments. Cf. Manhart, 435 U.S. at 717, 98 S.Ct. at 1380 (noting that although it is unlawful for an employer to require female employees to contribute more to a pension fund than male employees, it would not be unlawful for an employer to set aside equal retirement contributions for all employees, and to permit each retiree to purchase the largest benefit that his or her accumulated contributions could

command in the open market). I therefore reject EEAC's assertion.

Having concluded that the separation benefit policy facially discriminates based on age, I now address three additional arguments SmithKline raises. None of these arguments, however, is persuasive.

1) Congress Rejected a Requirement of Additional Consideration for ADEA Waivers

EEAC argues that the enhanced benefit policy cannot violate ADEA because Congress considered, but rejected, a requirement that older workers receive additional consideration for a release of ADEA claims. EEAC's strained reading of congressional intent, however, has no foundation in the statute's legislative history.

In 1990, Congress enacted the Older Workers Benefit Protection Act ("OWBPA"), which amended ADEA expressly to permit "knowing and voluntary" waivers of age discrimination claims. 29 U.S.C.A. s 626(f)(1) (West Supp.1993). The amendment's legislative history indicates that Congress sought to permit waivers of rights under ADEA without EEOC supervision, but also wanted to protect older workers from being coerced into surrendering their rights. See The Age Discrimination In Employment Waiver Protection Act of 1989, S.Rep. No. 79, 101st Cong., 1st Sess. 3-17 (1989) (incorporated by reference in Senate Report at 15, 1990 U.S.C.C.A.N. at 1520).

EEAC asserts that House and Senate bills introduced in 1989, but later reported out of committee, included provisions requiring additional consideration for valid waivers of ADEA claims. Because s 626(f)(1) does not include this requirement, EEAC argues, "it simply does not make sense that Congress would have considered it discriminatory not to offer such extra consideration in exchange for a waiver." EEAC Br. Supp. M. Summ. J. at 20. The primary flaw in EEAC's argument is that nothing in the legislative history of s 626(f)(1) suggests that Congress ever considered the issue of discrimination. Rather, the legislative history strongly suggests that Congress was primarily concerned with protecting employees from being bullied or coerced into surrendering potential age discrimination claims. See Senate Report at 32, 1990 U.S.C.C.A.N. at 1537 (noting that the Senate Committee on Labor and Human Resources specified minimum waiver requirements "with the intent of according basic due process protections to employees who are asked to execute waivers"). Further, the legislative history addresses the specific issue of ADEA waivers.

Nothing in the legislative history gives any indication,however, that Congress ever considered, let alone decided, whether a general waiver of all claims discriminates against older workers.

2) Judicial Approval of General Releases

SmithKline argues that courts have upheld the validity of executed releases similar to the one used by SmithKline, and therefore SmithKline's release does not violate ADEA. For support, SmithKline cites Cirillo v. Arco Chem. Co., 862 F.2d 448 (3d Cir.1988), in which the Court of Appeals reviewed the "totality of circumstances," and concluded that the plaintiff in that case executed a knowing and willful, and therefore enforceable release. SmithKline raised virtually the same argument, which I very clearly rejected, in its motion to dismiss. See DiBiase v. SmithKline Beecham Corp., 834 F.Supp. 143, 146 n. 4 (E.D.Pa.1993). Nevertheless, SmithKline resurrects its argument, but adds that

> Although Cirillo involved the validity of an executed release, certainly if the employer there had violated ADEA by failing to provide extra consideration to the plaintiff above the enhancement offered to "younger" employees, this would have rendered the release void. That the Third Circuit nevertheless upheld the release at least implicitly demonstrates that the consideration package provided by the employer (which did not include a special enhancement for the waiver of ADEA rights)

complied with ADEA.

Def.'s Mot. Summ. J. at 33-34. The fundamental flaw in this argument (and the reason I rejected virtually the same argument in SmithKline's motion to dismiss) is that the Court of Appeals was not confronted in Cirillo with the same issue that Plaintiff presents here. I decline SmithKline's invitation to speculate whether the Court of Appeals even considered an issue that was never directly addressed. As I stated in my previous opinion, Cirillo does not control whether SmithKline's separation benefit plan violates ADEA.

3) Public Policy Arguments

SmithKline argues that practical considerations support a conclusion that SmithKline's separation benefit policy does not violate ADEA. Primarily, SmithKline forecasts a "parade of horribles," in which employers will no longer be able to offer a single enhanced separation benefit package to all employees. Rather, SmithKline asserts, employers forced to offer special enhancements to employees in uniquely protected categories such as age and disability will soon cease to offer any enhanced separation benefits. For several reasons, SmithKline's ominous foreboding is unpersuasive.

First, SmithKline has only identified two unique categories--age and disability--within which only certain

employees are protected.[15] This hardly constitutes the unwieldy administrative nightmare that SmithKline portends.

Second, SmithKline's assertion that employers will be unable to account for their employees' protected traits is somewhat disingenuous, particularly in this case, where SmithKline constructed an "Adverse Impact Analysis" detailing the age, race, and gender of employees targeted for workforce reduction. See App. at 1422. Moreover, SmithKline apparently already accounts for an employee's disability status to ensure that the company does not treat persons with disabilities less favorably than persons without disabilities. See Barber Dep. at 108. Obviously this administrative burden must not be too onerous, or else SmithKline would not already bear it.

Third, I have difficulty believing that the widespread industry practice of offering enhanced benefits in exchange for a release of potential claims is so

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[15] At oral argument, SmithKline asserted that because some municipalities prohibit employment discrimination based on sexual orientation, only individuals with a sexual orientation are protected by such laws. Contrary to SmithKline's assertion, all individuals have a sexual orientation, and therefore all individuals are protected by such laws.

fragile that a decision requiring additional consideration for a valid release of ADEA claims will cause the practice to expire. This industry practice most likely entails a cost-benefit tradeoff, whereby an employer determines that paying enhanced benefits to all employees willing to waive potential claims is less costly than securing no waivers and litigating individual discrimination lawsuits. SmithKline may now add two additional factors into this calculation--the additional cost to secure ADEA waivers, compared with the additional litigation expense incurred by securing a release of all potential claims except those arising under ADEA.

Fourth, my conclusion would not differ even if SmithKline had articulated stronger public policy arguments opposing a requirement that employers offer additional consideration for a release of ADEA rights, because the statute signifies a clear congressional intent that distinctions based on age in the terms, conditions, and privileges of employment are impermissible. Cf. Manhart, 435 U.S. at 709, 98 S.Ct. at 1375-76 (stating that "the question of fairness to various classes affected by [Title VII] is essentially a matter of policy for the legislature to address").

Because SmithKline has not demonstrated that, as a matter of law, the Plan does not violate ADEA, I deny SmithKline's motion for summary judgment on Count II.

An appropriate order follows.

ORDER

AND NOW, this 15th day of March 1994, it is hereby ORDERED that SmithKline's motion for partial summary judgment (Document No. 20) is GRANTED as to Count I and DENIED as to Count II of Plaintiff's amended complaint (Document No. 5).

No. 95-292

Supreme Court, U.S.
FILED
SEP 18 1995
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

JOHN DIBIASE,
Petitioner,

v.

SMITHKLINE BEECHAM CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED *

1. Did the Court of Appeals err by holding that, where an employer acted pursuant to a facially neutral policy, an employee who claimed disparate treatment on account of age, needed to adduce evidence that the employer *intended* to discriminate on the basis of age?

2. Did the Court of Appeals err by holding that discriminatory intent was *not* shown by the fact that an employer offered an older employee the same severance benefit options offered to all other employees, regardless of age, after the employer was told that the older employee believed such treatment was discriminatory?

3. Did the Court of Appeals err by finding no age discrimination where an employer offered an older employee, upon his termination, the option of receiving enhanced severance benefits in exchange for a general release of all claims against the employer and, in doing so, the employer acted pursuant to a policy under which the same option was offered to every terminated employee, regardless of age?

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* Respondent offers these three questions as proper formulations of the issues raised in the Petition for a Writ of Certiorari ("Petition" or "Pet."). As explained in the Argument section of this Brief, however, Respondent believes that the first question is not appropriate for this Court's review because it was not argued below. *See* p. 8 *infra*.

PARTIES TO THE PROCEEDING

All of the parties to the proceeding are identified in the caption.

STATEMENT PURSUANT TO RULE 29.1

Respondent SmithKline Beecham Corporation ("SKB") is a Pennsylvania corporation. SKB's parent is SmithKline Beecham PLC (UK). SKB's subsidiaries (excluding those wholly owned by SKB) are: Beecham Group, P.L.C.; Beecham Pakistan (Private) Limited; Beecham Pharmaceuticals (PTE) Limited; Beecham Portuguesa Produtos Farmaceuticos E Quimicos LTDA; Beecham Yakuhin K.K.; Beecham-FSM Limited; Beeger Investments (PTY) Limited; Beelsa Investments (PTY) Limited; Beeyar Investments (PTY) Limited; Cainta Realty Corporation; Eskay, S.p.A.; Fournex S.A.; Group Laboratories South Africa (Proprietary) Limited; Hill & Murray Limited; Instituto Luso Farmaco S.A.; Macleans Limited; Masenco S.A. De C.V.; Mayfynn (Proprietary) Limited; Medisana Pharmazeutische U. Drogen-Handel GES.M.B.H.; P.T. Smithkline Beecham Pharmaceuticals; Paola Cocco, LDA; Produtos Beecham-Cosmeticos E Alimentacao LTDA; Publimark Publicidade E Marketing LTDA; S.R. One International B.V.; Sark S.p.A.; Smith Kline & French (N.Z.) Limited; Smith Kline & French B.V.; Smith Kline & French Laboratories Limited; Smith Kline & French of Pakistan Limited; Smith Kline & French Pension Trustees Limited; Smith Kline & French Protugesa Produtos Farmaceuticos LDA; Smith Kline & French, S.p.A.; Smithkline Beecham (Manufacturing) Limited; Smithkline Beecham (NZ) Limited; Smithkline Beecham A.B.; Smithkline Beecham A/S; Smithkline Beecham AG; Smithkline Beecham C.I.S.A.; Smithkline Beecham Consumer Brands A.B.; Smithkline Beecham Consumer Brands B.V.; Smithkline Beecham Consumer Healthcare (PTY) Limited; Smithkline Beecham Consumer Healthcare (Venezuela) S.A.; Smithkline Beecham Consumer Healthcare

Limited; Smithkline Beecham Consumer Healthcare PTE, Ltd.; Smithkline Beecham Consumer Healthcare Sendirian Berhad; Smithkline Beecham de Chile, S.A.; Smithkline Beecham de Venezuela C.A.; Smithkline Beecham Far East B.V.; Smithkline Beecham Farmaceutica S.A. de C.V.; Smithkline Beecham Farmaceutici S.p.A.; Smithkline Beecham Guatemala Limitada; Smithkline Beecham Inc.; Smithkline Beecham Laboratoires Pharmaceutiques SA; Smithkline Beecham Laboratories (Australia) Limited; Smithkline Beecham Markenartikel GMBH & Co. O.H.G.; Smithkline Beecham Markenartinel GMBH; Smithkline Beecham Nigeria PLC, Smithkline Beecham Overseas (No. 2) Limited; Smithkline Beecham Pharma Ges, M.B.H.; Smithkline Beecham Pharma Inc.; Smithkline Beecham Pharma S.A.; Smithkline Beecham Pharmaceuticals (PTY) Limited; Smithkline Beecham Pharmaceuticals A.B.; Smithkline Beecham Quimica Do Nordeste Ltda; Smithkline Beecham Quimica S.A., de C.V.; Smithkline Beecham S.A.; Smithkline Beecham Sante Animale S.A.; Smithkline Beecham Santa Grand Public S.A.; Smithkline Beecham Seiyaku K.K.; Smithkline Beecham-B Limited; Smithkline Bottling Company (PTY) Limited; W. Jordan Brushware (Proprietary) Limited; XIXIA Pharmaceuticals (Proprietary) Limited.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 95——

JOHN DIBIASE,

Petitioner,

v.

SMITHKLINE BEECHAM CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

STATEMENT OF THE CASE

An accurate statement of the facts of this case appears in the opinion of the Court of Appeals. *See* 48 F.3d at 722-24. A brief summary follows:

In early 1992, as part of a reduction in its workforce, SmithKline Beecham Corporation ("SKB") terminated John DiBiase's employment as a shift supervisor in the data processing department of its facility in King of Prussia, Pennsylvania. DiBiase was then 51 years old. *See id.* at 722.

At the time of DiBiase's termination, SKB had in effect a severance policy, which provided terminated employees with cash payments and continuation of their medical and dental insurance coverage. The policy entitled every terminated employee—without regard to age, race, sex or any other factor—to choose one of two options: a lump

sum cash payment equal to twelve months' salary and a three-month continuation of insurance coverage (the "Basic Benefits Package"); or a lump sum cash payment equal to fifteen months' salary and a six-month continuation of insurance coverage (the "Enhanced Benefits Package"). *See id.*

To receive the Basic Benefits Package, an employee needed do no more than select that option. To receive the Enhanced Benefits Package, an employee was required to execute a standard form, stating that the employee thereby agreed to

> release, waive and forever discharge SmithKline Beecham Corporation . . . from any and all claims, agreements, causes of action, demands or liabilities of any nature whatsoever . . . arising, occurring or existing at any time prior to the signing of this General Release, whether known or unknown.

The general release expressly applied to all claims under federal employment discrimination laws, including the ADEA. *See id.*

SKB's policy did not allow for a terminated employee to receive the Enhanced Benefits Package in exchange for a release of *some*, but not all, claims. Nor did the policy provide a graduated schedule of enhanced benefits according to the nature, number or magnitude of the claims that a terminated employee might have and be willing to waive; it made no attempt to assign any particular values to particular types of claims, *e.g.*, 100x for a race discrimination claim, 150x for an ERISA claim, 175x for an OSHA claim. Rather, identifying the value of any particular employee's claims was left to that employee, who could choose whether it was in his or her interest to waive the claims in exchange for the incremental benefits contained in the Enhanced Severance Package. *See id.*

Consistent with its policy, SKB offered DiBiase, upon his termination, a choice between the Basic Benefits Package and the Enhanced Benefits Package. However, DiBiase

wanted *both* to receive the Enhanced Benefits Package *and* to sue SKB on the theory that it had terminated him because of his age. He proposed, therefore, that SKB give him the enhancement in exchange for only a *partial* release of claims. SKB refused DiBiase's request and he chose the Basic Benefits Package. *See id.* at 722-23.

DiBiase then filed his wrongful termination claim. The District Court concluded that the claim lacked even the minimum factual evidence to go before a jury and awarded SKB summary judgment. *See id.* at 723.

DiBiase also sued SKB on the ground that its policy of requiring all terminated employees to release all claims in order to receive the Enhanced Benefits Package unlawfully discriminated against older workers. His theory was that, since only persons over 40 years of age ("older workers") could have—and therefore, give up—ADEA claims, older workers had to give up more than younger workers to receive the Enhanced Benefits Package.* The District Court awarded DiBiase summary judgment on that claim, finding that SKB's policy was *facially* discriminatory. *See id.* at 723-24.

The Third Circuit reversed, finding that (1) there was no facial discrimination because the policy, on its face, treated everyone identically, *i.e.*, each employee who chose the Enhanced Benefits Package was required to give up *all* claims; and (2) that there was no *non*facial discrimination because (a) there was no adverse treatment and (b) there was no evidence of any intent to discriminate. *See id.* at 726-30.

The fundamental error identified by the Court of Appeals in the position of DiBiase and the District Court was their failure to recognize that the general release did not waive abstract *rights*, but rather accrued *claims*. Since not every worker protected by the ADEA has an accrued ADEA claim, and not every accrued ADEA claim is more

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* DiBiase chose to pursue his claim exclusively under the "disparate treatment" theory and made no attempt to make out a case of "disparate impact". *See* 43 F.3d at 730-31.

valuable than other claims, it is wrong to say, as DiBiase and the District Court did, that older workers necessarily must give up more than younger workers in order to receive the Enhanced Benefits Package. The value of any particular worker's general release depends upon his or her particular experiences as an employee at SKB and not upon whether he or she is protected by a greater number of statutes. Indeed, as the District Court's dismissal of DiBiase's wrongful termination claim demonstrates, although DiBiase had ADEA *rights*, he did not have an ADEA *claim*. Once the erroneous conflation of rights and claims is removed, it becomes readily apparent that the SKB policy did not subject either DiBiase in particular, or older workers in general, to any adverse treatment on account of age. *See id.* at 729-30.

SUMMARY OF ARGUMENT

1. This Court should not grant *certiorari* in this case because it is not a sufficiently important case to warrant such attention. Neither this Court nor any other Court of Appeals has passed on the precise issue presented, whether an employer violates the ADEA by offering every terminated employee enhanced severance benefits in exchange for a general release of all claims. Therefore, there is no direct conflict between the opinion below and this Court and no split among the circuits. Nor is there any prospect of grave harm by leaving the decision below unreviewed; employees will simply continue to be given an opportunity to decide for themselves whether receiving enhanced benefits in exchange for waiving all accrued claims is in their best interests. Finally, this case revolves, in large part, around the particularities of DiBiase's own experiences at SKB, *e.g.*, the significance of his expressing to SKB his opinion that its policy was discriminatory. A decision by this Court on the merits, therefore, might have very little general applicability.

2. DiBiase's claims that the Court of Appeals erred on particular legal matters are without merit. His position that the court below should have read *UAW v. Johnson Controls, Inc.*, 449 U.S. 111 (1985), as eliminating the

need for DiBiase to prove discriminatory intent on the part of SKB is wrong. The Court of Appeals correctly interpreted *Johnson Controls* to say that independent evidence of discriminatory intent is unnecessary where adverse treatment occurs pursuant to a policy that *explicitly* discriminates on the basis of a protected trait; the Court of Appeals also correctly found that, because SKB's policy was *not* explicitly discriminatory, DiBiase had to produce evidence of SKB's intent to discriminate against him because of his age.

Similarly, contrary to DiBiase's position, the Court of Appeals did not contradict *Los Angeles Dep't of Water and Power v. Manhart*, 435 U.S. 702 (1978), by holding that SKB did not engage in age discrimination against DiBiase. The policy at issue in *Manhart* was the polar opposite of the SKB policy at issue here. In *Manhart*, the explicit terms of the policy classified employees according to gender and mandated adverse treatment, in the form of higher pension contributions, for women; in this case, the SKB policy makes *no* classification of employees and mandates the *same* treatment, a choice between Basic and Enhanced Benefits Packages, for all. Clearly, the Court of Appeals was right not to treat *Manhart* as requiring that the SKB policy be held to be discriminatory.

Finally, DiBiase's argument that recent amendments to the ADEA require employers to pay older employees who waive all their claims more than they pay younger employees who waive all their claims has no support in the statutory language. In fact, the legislative history shows that Congress considered and rejected the rule DiBiase proposes.

REASONS FOR DENYING THE WRIT

I. THIS CASE DOES NOT WARRANT A DECISION ON THE MERITS BY THIS COURT.

This case does not present any issue that makes it necessary, wise or efficient for this Court to devote its resources to a consideration of the individual merits of

DiBiase's claim. First of all, the basic issue—whether the ADEA proscribes employers from offering all their employees, equally, enhanced severance benefits in exchange for a general release—has not been ruled upon by this Court. Thus, there is no possibility that the decision below is in direct conflict with this Court's prior holdings. Second, the decision below is the only decision on the issue by any Court of Appeals. Thus, there is no split among the circuits requiring this Court's resolution.

Third, there is no grave potential harm from not having a Supreme Court decision on the issue. Employees simply will continue to be provided with a severance benefit option that they can freely accept or reject according to their own appraisals of their own individual circumstances. If they decide that the value of their accrued claims, if any, is less than that of the enhancement, they can choose to benefit themselves by opting for the enhancement; if they decide that the value of their accrued claims is higher than that of the enhancement, they can benefit themselves by foregoing the enhancement and suing on their claims.

Fourth, a decision by this Court on the merits of this case might well have only a very limited impact. This case revolves around the particularities of DiBiase's own factual circumstances. For example, whether DiBiase's comment to SKB that he thought its policy was discriminatory serves as evidence of intent to discriminate on the part of SKB is a fact-bound question that would not likely have any broad application to ADEA cases generally.

In sum, this case does not present a conflict or other issue of sufficient significance or generality to warrant the expenditure of this Court's resources that would be necessary to come to a decision on the merits. In addition, as set forth in detail in Sections II, III and IV below, Petitioner is clearly mistaken with respect to the specific legal infirmities he claims exist in the decision below.

II. THE COURT OF APPEALS' VIEW OF THE INTENT REQUIREMENT IN DISPARATE TREATMENT CASES IS CORRECT.

A. The Court Of Appeals Opinion Is Consistent With The Prior Opinions Of This Court On This Issue.

1. *The Court of Appeals opinion is not in conflict with Johnson Controls.*

Although DiBiase's position is not entirely clear from the Petition, he appears to argue that the Court of Appeals opinion conflicts with *UAW v. Johnson Controls, Inc.*, 449 U.S. 111 (1985), on the need for evidence of discriminatory intent in disparate treatment cases. *See* Pet. at 14-15. That argument, however, clearly has no merit. *Johnson Controls* found no need for independent evidence of discriminatory intent where a policy was *facially* discriminatory. In *Johnson Controls*, this Court said:

> [T]he absence of a malevolent motive does not convert a *facially* discriminatory policy into a neutral policy with a discriminatory effect. Whether an employment practice involves disparate treatment through *explicit facial discrimination* does not depend on why the employer discriminates but rather on the explicit terms of the discrimination.

449 U.S. at 199 (emphasis added).

The Court of Appeals recognized that standard to apply to facially discriminatory policies. It quoted from the *Johnson Controls* passage just cited and explained its reasoning:

> [I]n a facial disparate treatment case, the protected trait by definition plays a role in the decisionmaking process, inasmuch as the policy explicitly classifies people on that basis. Thus, when the policy itself displays the unlawful categorization, the employee is relieevd from independently proving intent.

43 F.3d at 726.

However, in the instant case, the Court of Appeals found that SKB's policy was *not* facially discriminatory—

indeed, that it was an "archetypical example of a facially *non*-discriminatory policy". 43 F.3d at 727. The court explained that "[SKB] made the expanded package available to all persons willing to sign the release, regardless of age." *Id.* Therefore, the statement in *Johnson Controls* to the effect that discriminatory intent need not be shown separately where a policy is *facially* discriminatory was not directly apposite.

Thus, the opinion below is not in the least at odds with *Johnson Controls.*

2. ***This Court should not grant certiorari to review whether the Court of Apeals correctly applied the intent requirement in this case.***

a. *This issue was not raised in the Court of Appeals.*

DiBiase appears to argue for the first time in his Petition that a claim of *nonfacial* disparate treatment does not require evidence of an intention to discriminate. *See* Pet. at 14-18. In the District Court, DiBaise did not raise the issue and in the Court of Appeals, he expressly conceded that evidence of intent to discriminate was required to prevail on a nonfacial disparate treatment claim. In his appellate brief, he stated:

> If, arguendo, the [SKB policy] is not facially discriminatory, it still unlawfully discriminates against older workers. This follows since the only component that a finding of explicit facial discrimination adds is the removal of any requirement to prove there was intent to discriminate.

Brief of Plaintiff-Appellee at 16. As a consequence of DiBiase's concession, the Court of Appeals did not directly address this issue as critical for its decision. Having not been raised below, the issue is not appropriate for review in this Court. *See Delta Air Lines v. August,* 450 U.S. 346, 362 (1981) (stating that "a question presented in the peittion but not raised in the lower court of appeals is not properly before us").

b. *The Court of Appeals properly treated independent evidence of discriminatory intent as necessary for DiBiase's claim.*

To the extent that the Court of Appeals opinion may be read as *deciding* (rather than simply *assuming*) that evidence of discriminatory intent is necessary for a claim of nonfacial disparate treatment, it is wholly consistent with a long line of Supreme Court cases. The Court of Appeals stated that independent evidence of discriminatory intent is not necessary in *facial* disparate treatment cases, but is necessary in *non*facial disparate treatment cases. *See* 43 F.3d at 726-28. That is exactly what this Court has previously held.

Indeed, intent to discriminate must be shown in *all* disparate treatment cases: where the alleged discrimination is pursuant to a policy that discriminates on its face, that intent is apparent from the policy itself and no further evidence is necessary; where the alleged discrimination is not pursuant to such a policy, however, independent evidence of discriminatory motive is necessary. In *Hazen Paper Co. v. Biggins*, —— U.S. ——, 113 S. Ct. 1701 (1993), for example, this Court stated:

> Disparate treatment . . . is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion [or other protected characteristic.] Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment. . . .

113 S.Ct. at 1705 (internal quotations and citations omitted).

In *Hazen Paper* itself, the plaintiff won a judgment against his employer for wrongful discharge under the ADEA, although there was no facially discriminatory policy involved. The Court of Appeals affirmed, largely

on the basis that the plaintiff had introduced evidence at trial that the employer had fired him in order to prevent his retirement benefits from vesting. This Court, however, reversed and remanded, holding that "there is no disparate treatment under the ADEA when the factor motivating the employer is some feature other than the employee's age," even a factor—such as qualification for retirement benefits—that is correlated with age. *Id.* The Court explained:

> In a disparate treatment case, liability depends on whether the protected trait (under the ADEA, age) actually motivated the employer's decision. The employer may have relied upon a formal, facially discriminatory policy requiring adverse treatment of employees with that trait. Or the employer may have been motivated by the protected trait on an ad hoc, informal basis. Whatever the employer's decisionmaking process, a disparate treatment claim cannot succeed unless the employee's protected trait actually played a role in that process and had a determinative influence on the outcome.

Id. at 1706 (citations omitted). Thus, *Hazen Paper* makes clear that an intention to discriminate is an essential element of a nonfacial disparate treatment claim. That is precisely the position of the Court of Appeals in this case.[1]

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[1] DiBiase also appears to argue that the Court of Appeals decision requires a plaintiff claiming nonfacial disparate treatment to adduce evidence that the defendant had actual knowledge that the practice at issue was illegal. *See* Pet. at 15 (including discussion of the *scienter* concept applicable to certain securities law violations). Nothing in the Court of Appeals opinion, however, suggests such a requirement. To the extent that the opinion below mentions the intent requirement at all, it is clear that the court is referring to the *intent to discriminate on the basis of age* and not to knowledge of illegality. *See* 48 F.3d at 728 & n.10 (noting that, in the absence of a facially discriminatory policy, DiBiase had to prove that SKB "intended to target older workers"). In so doing, the Court of Appeals correctly used the same notion of intent that is

B. Neither Precedent Nor Logic Supports Treating Notice of An Employee's Intention To File A Claim As Proving The Employer's Discriminatory Intent.

DiBiase asserts that, by telling SKB that he thought its policy treated older workers worse than younger workers, he placed SKB "on notice" of the discriminatory character of the policy. SKB's application of the policy despite such "notice", DiBiase argues, is sufficient proof of SKB's intent to discriminate. The Court of Appeals dismissed that argument in a footnote. *See* 43 F.3d at 728 n.10. DiBiase now contends that the Court of Appeals position is contrary to this Court's holding in *Johnson Controls*. *See* Pet. at 17-18. The fatal flaw of that contention is that it presumes a similarity between *Johnson Controls* and this case that does not exist.

In *Johnson Controls*, this Court considered a policy that, by its *explicit* terms, excluded females, but not males, from certain jobs. Given such explicit or "facial" discrimination, it was not necessary to introduce independent evidence of intent to discriminate according to gender: the words of the policy showed conclusively that the employer intended to discriminate on that basis. *See* 449 U.S. at 197. Here, there is no such explicit discrimination. The SKB policy does not, on its face, mandate that terminated employees are to be given different severance options according to their ages. Indeed, as the Court of Appeals found, the SKB policy mandates the same treatment for all and it is impossible to know, from the terms of the SKB policy itself, which workers might be better off and which worse off. *See* 43 F.3d at 727, 730. That critical difference between the policy at issue in *Johnson Controls* and the policy at issue here explains why there was no need to adduce independent evidence of discriminatory

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used by this Court in nonfacial disparate treatment cases. *See, e.g., Hazen Paper*, 113 S. Ct. at 1706 ("In a disparate treatment case, liability depends on whether the protected trait (under the ADEA, age) actually motivated the employer's decision.").

intent in *Johnson Controls*, while there was such a need here.

Furthermore, nothing in *Johnson Controls* or any other decision of this Court suggests that discriminatory intent may be proved merely by showing that the plaintiff expressed to the defendant his opinion that the defendant's policy was discriminatory. Neither DiBiase nor any other employee is presumptively infallible on the issue of whether an employment policy is discriminatory. And no employer need accept an employee's opinion on the matter as true and design and implement policies on the basis of that opinion. Indeed, in this case, DiBiase's opinion was found by the Court of Appeals to be wrong; despite his perhaps sincere feelings to the contrary, there was no showing that SKB's policy actually treated him less well than it treated younger employees.

Lack of precedent aside, DiBiase's argument should be rejected for its unfair and nonsensical consequences. As the Court of Appeals observed, DiBiase's position would allow any plaintiff to "manufacture" discriminatory intent simply by opining to the employer that its actions were discriminatory. 43 F.3d at 728 n.10.

III. THE COURT OF APPEALS DECISION DOES NOT CONFLICT WITH THIS COURT'S DECISION IN *MANHART*.

DiBiase also argues that, "by reasoning that the [SKB policy] was not age discriminatory", the Court of Appeals decision is in conflict with *Los Angeles Dep't of Water and Power v. Manhart*, 435 U.S. 702 (1978). Pet. at 20. That argument fails, however, because the policy at issue in *Manhart*, by its explicit terms, treated members of the protected class adversely *vis a vis* nonmembers. In contrast, the SKB policy, by its explicit terms, treated all employees equally.

In *Manhart*, the policy at issue expressly required female workers to contribute to a pension plan at a higher rate than

male workers. It was manifest—on the face of the policy itself—that any female worker had to pay out more than any male worker.[2] Here, by contrast, every employee is treated equally by being given the same choice of severance options. Whether any particular terminated employee is better off or worse off under the SKB policy than any other depends upon a complex set of facts about his or her past experience at SKB. (Only a careful analysis of those facts will show how much any given worker gives up by signing a general release in exchange for the Enhanced Benefits Package.) As the Court of Appeals accurately observed:

> [SKB] conditioned the right to the expanded benefits on an employee's blanket waiver of all accrued claims; this treatment cannot be said to be disparate, because it is impossible to tell whose package of

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[2] A long line of this Court's decisions show that the hallmark of *facial* discrimination, such as that in *Manhart*, is an explicit classification of persons on the basis of a protected trait. *Dothard v. Rawlinson*, 433 U.S. 321 (1977), for example, concerned a challenge to two employment policies: one expressly prohibiting women from serving as counselors at certain correctional facilities, the other imposing height and weight requirements for prison guards. *See* 433 U.S. at 332. The Court held that only the first, because it contained an *explicit* gender classification, could be *facially* discriminatory; the second, because it contained no such classification, was "facially neutral". *Id.* at 320.

The cases following *Dothard* that this Court has treated as facial discrimination cases reveal that hallmark. *See Manhart*, 435 U.S. 702, 711, 715 (1978) (concerning a practice that explicitly required women to contribute more than men to a pension program); *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985) (concerning a policy expressly allowing only pilots under 60 to "bump" flight engineers); *Johnson Controls*, 449 U.S. 187, 197 (1991) (concerning policy that explicitly prevented fertile women, but not fertile men, from being placed in certain jobs).

The SKB policy at issue here contains no explicit instruction that older workers be treated differently; in fact, it expressly mandates that all employees be treated the same. Thus, this case is manifestly unlike the facial discrimination cases cited above.

> potential claims is more valuable. Therefore, in light of the above, DiBiase has no disparate treatment claim against [SKB].

43 F.3d at 730 (footnote omitted).

Manhart and this case are polar opposites: whereas the *Manhart* policy explicitly classified employees according to a protected trait (gender) and treated one group (women) adversely, the SKB policy contains no explicit classification and treats all employees the same. Hence, *Manhart* cannot control the disposition of this case and the Court of Appeals decision cannot be said to be in conflict with *Manhart*.

IV. THE COURT OF APPEALS DECISION DID NOT VIOLATE ANY CONGRESSIONAL MANDATE WITH RESPECT TO THE ADEA.

Finally, DiBiase argues that the Court of Appeals decision violates a Congressional mandate with respect to the ADEA. *See* Pet. at 23-24. That argument, however, wrongly assumes that the Older Workers Benefit Protection Act ("OWBPA") prohibits employers from offering older and younger workers equally the option of receiving enhanced severance benefits in exchange for a general release of all claims against the employer.

A principal feature of OWBPA is its specification of certain conditions that must exist in order for waivers of ADEA claims to be considered valid. *See* 29 U.S.C.A. § 626(f). By legislating such conditions, Congress made clear that neither ADEA waivers nor employer requests for such waivers are, in principle, unlawful. In addition, the legislative history of OWBPA shows that Congress did not find policies such as SKB's to be objectionable.

In enacting OWBPA, Congress focused on the practice of requesting waivers of ADEA claims and on the consideration to be paid for such waivers. Indeed, Congress focused specifically on the practice at issue here: exchanging enhanced severance benefits for a general re-

lease of all claims. The Senate Report on OWBPA expresses Congress' broad concern with ADEA waivers by, among other things, referring explicitly to two judicial decisions, *Cirillo v. ARCO Chemical Co.*, 862 F.2d 448 (3d Cir. 1988), and *Lancaster v. Buerkle Buick Honda Co.*, 809 F.2d 539 (8th Cir.), *cert. denied*, 482 U.S. 928 (1987). *See* 5 1990 U.S.C.C.A.N. 1509, 1537. Both cases involved ADEA waivers made as part of general releases. While the Senate Report focused on how those decisions analyzed the validity of the waivers (and expressed a preference for the *Cirillo* approach), it revealed absolutely no discomfort with the practice of providing *all* employees with the same consideration for a general release of all claims.

Moreover, the legislative history of OWBPA contains evidence that Congress considered—and rejected—a requirement that extra consideration be paid for general releases that included ADEA claims. Early in the legislative term in which OWBPA was passed, the Senate and House of Representatives considered two other bills regulating ADEA waivers. Both of those bills required that:

> the rights or claims are waived in exchange for consideration in addition to anything of value
>
> > (i) to which the individual already is entitled; or
> >
> > (ii) that has been offered to a group or class of individuals under an early retirement incentive or other employment termination program[.]

S. 54, 101st Cong., 1st Sess., 135 Cong. Rec. 5168 (Daily Ed. Jan. 25, 1989); H.R. 1432, 101st Cong., 1st Sess., 135 Cong. Rec. H697 (Daily Ed. Mar. 15, 1989).

The second of those alternative tests would have required employers to provide extra consideration—above what they offered generally in their severance program—to employees waiving ADEA claims, which is essentially

what DiBiase demands here. Neither of those bills was enacted.

Later in the session, Congress returned to the ADEA waiver issue and drafted new provisions, "represent[ing] a change from the approach" of the earlier bills. S. Rep. No. 263, 101st Cong., 2d Sess. 31 (1990). Among the most significant departures from the earlier bills was the absence of the requirement for consideration beyond that offered in group severance programs. On the subject of consideration, the new bill simply stated that waivers must be made

> only in exchange for consideration in addition to anything of value to which the individual already is entitled[.]

29 U.S.C.A. § 626(f)(10)(D). *That* language, not the language of the earlier bills, was enacted and became part of the ADEA. Thus, Congress chose to reject the extra consideration requirement.

In sum, there is no provision in OWBPA prohibiting a practice such as SKB's, which offers all employees equally the option of enhanced benefits in exchange for a general release of all claims. In fact, the legislative history suggests that Congress not only accepted or acquiesced in such practices, but also deliberately refused to alter them in the way DiBiase proposes. In rejecting DiBiase's proposal, the Court of Appeals acted consistently with Congressional intent.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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